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APPENDIX

Supreme Court of the United States

October Term, 1968

No. 65

TIMOTHY F. LEARY,

Petitioner,

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 27, 1968 — CERTIORARI GRANTED JUNE 10, 1968

INDEX

	PAGE
APPENDIX A—Opinion of the U.S. Court of Appeals for the Fifth Circuit	1a
APPENDIX B—Opinion of the U. S. Court of Appeals for the Fifth Circuit, denying Petition for Rehearing	37a
APPENDIX C—Judgment of the U.S. Court of Appeals for the Fifth Circuit	41a
APPENDIX D—Order of the U.S. Supreme Court granting Certiorari	42a
APPENDIX E—Constitutional, Statutory and Regulatory provisions involved	43a
A. Constitutional Provisions:	
Amendment V to the Constitution	43a
B. Statutory Provisions:	
21 U.S.C. § 176a	43a
26 U.S.C. § 4741-4	44a-48a
26 U.S.C. § 4751-5	48a-52a
26 U.S.C. § 4773	54a
§ 4775	55a
C. Regulatory Provisions:	
26 C.F.R. 152.61-152.68	55a-57a

APPENDIX F—Portions of the Record

	PAGE
1. Relevant docket entries	58a
2. Indictment	60a
3. Testimony	62a
A. Testimony of Customs Inspector Herbert O. Best	62a
B. Testimony of Customs Inspectress Helen M. Loftis	72a
C. Testimony of Customs Agent Rey L. Hatch	74a
D. Testimony of Customs Chemist Fred V. Eggerton	80a
E. Testimony of petitioner, Timothy F. Leary	83a
F. Testimony of Dr. Joe Fort	92a
G. Trial Judge's Charge to Jury	93a

INDEX

PAGE

APPENDIX A—Opinion of the U.S. Court of Appeals for the Fifth Circuit 1a

APPENDIX B—Opinion of the U. S. Court of Appeals for the Fifth Circuit, denying Petition for Rehearing 37a

APPENDIX C—Judgment of the U.S. Court of Appeals for the Fifth Circuit 41a

APPENDIX D—Order of the U.S. Supreme Court granting Certiorari 42a

APPENDIX E—Constitutional, Statutory and Regulatory provisions involved 43a

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Amendment V to the Constitution 43a

B. Statutory Provisions:

21 U.S.C. § 176a 43a

26 U.S.C. § 4741-4 .....44a-48a

26 U.S.C. § 4751-5 .....48a-52a

26 U.S.C. § 4773 ..... 54a

§ 4775 ..... 55a

C. Regulatory Provisions:

26 C.F.R. 152.61-152.68 .....55a-57a

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C. Testimony of Customs Agent Rey L. Hatch	74a
D. Testimony of Customs Chemist Fred V. Eggerton	80a
E. Testimony of petitioner, Timothy F. Leary	83a
F. Testimony of Dr. Joe Fort	92a
G. Trial Judge's Charge to Jury	93a

APPENDIX A

Opinion of the United States Court of Appeals for the Fifth Circuit

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 23570

TIMOTHY LEARY,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS.

(September 29, 1967)

Before GEWIN and AINSWORTH, Circuit Judges, and LYNNE, District Judge.

AINSWORTH, Circuit Judge: This unusual criminal case delves into the new realm of psychedelic experience, and into mysticism, religion and its free exercise. The principal issue we must decide is whether the conviction of appellant for violations of federal criminal statutes relating to marihuana—a psychedelic drug which the defendant claims he uses as a religious sacramental aid—contravenes the accused's First Amendment right to the free exercise of his religion. There are, however, other important questions, some of them constitutional also, which we will discuss fully.

Dr. Timothy Leary, appellant, and his minor daughter, Susan Leary, age 18, were jointly indicted on three counts

for offenses pertaining to marihuana. Dr. Leary was tried before a jury on March 11, 1966. Count 1, which charged the smuggling of marinuana into the United States which should have been invoiced (declared), was dismissed by the court following a motion for judgment of acquittal. Dr. Leary was found guilty, however, on Count 2, which charged transportation, and facilitation of transportation, and concealment of marihuana after importation,[1] in violation of 21 U.S.C. § 176a,[2] and on Count 3, which

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[1] Count 2 of the indictment reads as follows:

"*Count Two.* That on or about December 22, 1965, in the Laredo division of the Southern District of Texas, and within the jurisdiction of this Court, one TIMOTHY LEARY and one SUSAN LEARY, hereinafter called defendants, with intent to defraud the United States, did unlawfully and knowingly transport and facilitate the transportation and concealment of three (3) ounces of Marihuana (Cannabis Sativa), more or less, after importation, and the defendants then and there knew the said Marihuana to have been imported into the United States contrary to law, in violation of Section 176(a), Title 21, United States Code."

[2] 21 U.S.C. § 176a provides:

"Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. * * *

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

(No suspension of sentence, probation or parole is allowed as to a conviction for this offense. See 26 U.S.C. § 7237(d).)

charged transportation and concealment of marihuana by defendants as transferees, required to pay the transfer tax imposed by the Internal Revenue Code,[3] in violation of 26 U.S.C. § 4744(a)(2).[4] Appellant was sentenced to the maximum penalties and fines provided for such offenses, subject, however, to the provisions of 18 U.S.C. § 4208(b), and was ordered committed to the medical cen-

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[3] Count 3 of the indictment reads as follows:

"*Count Three.* That on or about December 22, 1965, in the Laredo Division of the Southern District of Texas, and within the jurisdiction of this Court, one TIMOTHY LEARY and one SUSAN LEARY, transferees, required to pay the transfer tax imposed by the Internal Revenue Code, did unlawfully and knowingly transport, conceal and facilitate the transportation and concealment of a quantity of Marihuana, to-wit: approximately three (3) ounces of Marihuana (Cannabis Sativa) without having paid the transfer tax imposed by said code, in violation of Section 4744(a)(2), Title 26, United States Code."

[4] 26 U.S.C. § 4744(a)(2) provides:

"It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a)—

(1) to acquire or otherwise obtain any marihuana without having paid such tax, or

(2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.

"Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or [h]is delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a)."

26 U.S.C. § 7237 provides for a maximum fine of $20,000 an imprisonment of ten years for a first offense in violation of 26 U.S.C. § 4744(a)(2).

The rate of the special tax on marihuana is provided for in 26 U.S.C. § 4741. The written order form required of the transferee of marihuana is set forth in 26 U.S.C. § 4742.

ter at Springfield, Missouri, for a complete study[5] to be used by the court as a basis for determining the ultimate

[5] 18 U.S.C. § 4208 provides in pertinent part that

"(b) If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. * * *

"(c) Upon commitment of a prisoner sentenced to imprisonment * * * the Director, under such regulations as the Attorney General may prescribe, shall cause a complete study to be made of the prisoner and shall furnish to the board of parole a summary report together with any recommendations which in his opinion would be helpful in determining the suitability of the prisoner for parole. This report may include but shall not be limited to data regarding the prisoner's previous delinquency or criminal experience, pertinent circumstances of his social background, his capabilities, his mental and physical health, and such other factors as may be considered pertinent. The board of parole may make such other investigation as it may deem necessary."

The court ordered that the sentences imposed be consecutive and the fines cumulative (amounting to a total of 30 years and $40,000). The district judge of course is awaiting the outcome of this appeal, and upon our affirmation, under the provisions of 18 U.S.C. §4208(b) may, in his discretion, reduce the term of imprisonment or place the appellant on probation under Count 3 and reduce the sentence of imprisonment under Count 2.

However, conviction under 21 U.S.C. § 176a requires a mandatory sentence of five years, and under 26 U.S.C. § 7237 there can be no suspension of sentence or probation for such conviction.

sentence in the case. Defendant's motion for a new trial was denied.

Susan Leary was tried at the same time as her father, Dr. Leary, by the court without a jury (trial by jury having been waived) and found guilty on Count 3 of the indictment but not guilty on Counts 1 and 2. Imposition of sentence was suspended and she was placed on probation during the remainder of her minority, without supervision, under the provisions of the Youth Corrections Act, 18 U.S.C. § 5010(a). Her appeal was then dismissed on her own motion.

The facts of this case are relatively uncomplicated.

Dr. Leary left New York on December 20, 1965 by automobile, accompanied by his two children, Susan, age 18, and John, age 16, and two other persons. Their destination was Yucatan, Mexico, and the alleged purpose of the trip was a Christmas vacation for the Leary children and to provide Dr. Leary the opportunity to write a book and to prepare for a summer session to be conducted with a research group at his home in Millbrook, New York. On December 22, 1965, Dr. Leary and the four passengers drove across the international boundary at Laredo, Texas, into the Republic of Mexico, stopped at the Mexican immigration station for several minutes, and turned back toward the United States. At approximately 6:45 p.m., they arrived at the secondary inspection area, Laredo International Bridge, Laredo, Texas. Dr. Leary, the driver of the vehicle, told a U. S. Customs official that they had driven across the boundary into Mexico within the prior hour, that they had been unable to secure tourist permits and had been told by Mexican immigration officials to return the following morning at 8:00 a.m. at which time the necessary Mexican permits would be given to them. The U. S. inspector asked the group if they had anything to declare from Mexico and was told that they had not. After

the occupants alighted from the vehicle, the U.S. inspector observed some vegetable material and a seed on the floor of the automobile which appeared to him to be marihuana. Thus the five travelers were arrested. A search of the baggage, the vehicle and of the individuals was made. Sweepings from the car floor and glove compartment were later proved to be marihuana.* While Dr. Leary was being searched, he stated that he had never used marihuana. A woman Customs inspector performed a personal search of the two female travelers, which resulted in the finding of a small metal container on the person of Susan Leary after she had disrobed. Within the container were three partially smoked marihuana cigarettes, a small quantity of semi-refined marihuana and capsules of detroamphetamine sulfate (said to be a nonprohibitive narcotic). Demand was made of Dr. Leary for the required Treasury Department transferee form. He stated that he had no such form. Susan Leary, in response to the same demand, refused to make any statement. Dr. Leary admitted to a U.S. Customs agent that the metal box taken from his daughter, Susan, containing the marihuana, was his property. He further stated in the presence of two Government agents that he knew more about narcotics and marihuana than either of them.

Dr. Leary testified on his own behalf. He admitted that the seized marihuana had been obtained by him in New York and had been in his possession continuously on his trip from New York to Laredo; that he had neither obtained an order form nor paid a transfer tax for the marihuana as required by the statute. He said that he asked the four people in his group to get rid of the marihuana; that just prior to arriving at the U.S. Customs Station, while crossing the International Bridge, he asked if the

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* The indictment refers to three ounces of marihuana. Analysis and weighing of the seized material disclosed that a total of a little less than one half of an ounce had been found and confiscated.

marihuana had been disposed of and was told by Susan, his daughter, that it had not been and it was in her possession. He further admitted that while on the trip from New York to Mexico at an overnight stop in New Orleans, Louisiana, he smoked marihuana to relieve a low spiritual state; that this incident was equivalent to an hour of silent meditation from which he derived spiritual benefit. Dr. Leary testified that he was familiar with the laws of the United States relative to marihuana and was aware that his actions were contrary to such laws.[1] In his testimony he attempted to justify use of this drug which he said was for religious and scientific purposes.

Dr. Leary has an impressive academic background. He testified that he received a Ph. D. degree in Clinical Psychology from the University of California. During the years from 1944 to 1950 he wrote and published several publications relative to the use of psychedelic drugs in the treatment of the mentally ill, including thirteen scientific articles and two books. In 1950 he helped found the Kaiser Psychiatric Clinic in Oakland, California. During the next eight years he received nearly one-half million dollars in federal grants at the Kaiser Clinic for research work on mental illness. He published four diagnostic tests relative to mental illness which have been used in diagnosing and treating mental patients in over 750 clinics and hospitals in the United States and which have been translated into several foreign languages. He served on the University of California medical faculty from 1953 to 1956. In 1959 he joined the Harvard University faculty.

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[1] Dr. Leary was questioned by the court as follows:

"The Court: I take it that you make—that you do not deny that you have recognized all the time that the transportation and the use, and so forth, of this marihuana is contrary to the laws of the United States?

"The Witness: Yes, sir. I know they are contrary to the laws of the United States."

Appendix A

In 1960, while visiting Mexico, he testified that he had "the most intense religious experience" he had ever had in his life as the result of having eaten a number of the "Sacred Mushrooms" of Mexico. The incident changed his life. Since that time he has written five books and thirty-eight articles pertaining to religious and scientific use of psychedelic drugs, and he has devoted his life to attempting to understand the religious experience and how it can be applied to help others. He said that he formed a religious research group after returning to Harvard University, and with the help of Aldous Huxley, he experimented with certain psychedelic drugs. In 1962 he studied Hinduism and after a year became a member of a Hindu sect. In 1963 he left Harvard, performed further experimental work in Mexico, and later established a center and workshop for religious and scientific research in Millbrook, New York, which center is now his home. The building also serves as a place for religious meditation and spiritual retreat. Rooms in the house contain shrines devoted to Hindu, Buddhist and Christian ways of finding God, as well as religious pictures and statues. Dr. Leary has traveled extensively through Asia in pursuit of his religious endeavors and has studied Buddhism and Hinduism with several religious teachers and monks. While studying in India with Sri Asoke Fukir, a religious leader, Dr. Leary participated in religious rituals in which marihuana was used. He was converted to Hinduism, and is now a member of the Brahmakrishna sect in Massachusetts.

Dr. Leary further testified that he first used marihuana in August or September 1964. Marihuana enables him to attain what he describes as the third level of consciousness. Other psychedelic drugs take a person to a higher level. According to the Hindu religion, there are thousands of roads to illumination to the god within a person. Different sects specialize in different aids. The Hindu sect in India of which he became a member uses marihuana for religious

illumination and meditation. He ordinarily uses marihuana less than once a week and then only for religious purposes. He draws no distinction between his religious beliefs and his scientific experimentation. If he could not use marihuana it would not affect his religious beliefs but he would consider it a violation of those beliefs and practices if he were denied its use.

Dr. Leary said he acquired the marihuana in New York which led to his conviction. He testified that the reason he did not declare the marihuana at the U.S. Customs Office at Laredo was his apprehension of being subjected to investigation or arrest. He never complied with the Treasury Department regulations relative to marihuana because he knew that he could not obtain permission for its use inasmuch as his research is not performed in a laboratory and is of a religious nature; that the law makes no provision for the use of marihuana under such circumstances; that if he had attempted to register or to pay the required tax, the marihuana would have been taken from him and he would have been subjected to legal action. He had applied for and been refused permits for other chemicals such as mescaline, peyote and LSD. He believes he has both a moral and a political right to possess marihuana.

Fred Swain (Sri Kalidas, in religion) testified on behalf of appellant. He is an American Hindu Sanyasa (monk), a renunciant, living in a monastery, who joined the religious order of which appellant is a member in 1948. He met Dr. Leary in 1962 and later participated in psychedelic experiments with him at Harvard University. While traveling in India he was often in the company of Dr. Leary; he smoked marihuana with him in the Rishikesh, a city of holy men, along the banks of the Ganges River, in Hindu religious services. He said that marihuana plays a very important part in the rituals of the Hindu sect conducted by Sri Asoke Fukir in India. The Brahmakrishma sect in the United States of which he and Dr. Leary are members is a

highly established authority sect in India, recognized throughout India by all Hindus. He admitted that he was partially able to achieve and practice his religious beliefs in the Hindu sect without the use of marihuana. He does not use marihuana in the United States because it is unavailable; he is forced to use other psychedelic drugs in conjunction with meditation and prayer.

Dr. Ralph Metzner, a psychopharmacologist who received his Master's degree from Oxford and Ph. D. in Psychology from Harvard, testified on behalf of appellant. He co-authored with Dr. Leary the book "Psychedelic Experience" as well as several articles including "Reducing Criminal Behavior" by the use of the psychedelic drug psilocybin (the extract of the sacred mushroom). The word "psychedelic" refers to a class of drugs, which includes LSD, mescaline, marihuana, among others, whose primary effect is to expand consciousness, heighten intellectual activity and sensory awareness. In India he was initiated into the same Hindu sect of which Dr. Leary is a member. He participated with Dr. Leary in several scientific experiments under the auspices of Harvard University. He also assisted Dr. Leary in conducting seminars, giving lectures, writing books and giving training courses in consciousness expansion without drugs. He corroborated Dr. Leary's testimony concerning the religious nature and character of the Millbrook center in New York.[8]

Appellant's points of error are stated substantially as follows:

1 (A). The District Court erred in refusing to instruct the jury to acquit appellant if it found his religious claims to be honest and in good faith.

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[8] Out of the presence of the jury Dr. Metzner testified at length that marihuana was a mild, relatively harmless and non-addictive drug. Dr. Joe Fort, medical doctor with special training in psychiatry and drug addiction, also testified out of the presence of the jury substantially to the same effect.

Appendix A

1 (B). In light of the federal exemption from restrictive legislation granted to religious users of peyote and the Government's inability to establish that marihuana is more harmful than peyote, the denial of a religious exemption from the marihuana legislation is an invidious religious discrimination in violation of the First and Fifth Amendments.

2. Denial of appellant's motions for a bill of particulars specifying the location, direction and time of alleged transportation was reversible error; alternatively, the indictment was fatally insufficient.

3. The District Court's instructions on the meaning of the statutory presumptions (a) effectively directing conviction and imposed upon appellant the burden of proving his innocence; (b) were misleading and authorized convictions if appellant did not prove to the jury's "satisfaction" that his possession was "lawful" and "legitimate"; and (c) failed to direct acquittal if the jury believed that appellant lacked knowledge of illegal importation—all in violation of the Fifth and Sixth Amendments and amounting to "plain error" under Rule 52(b), Fed. R. Crim. P.

4. The Government's closing argument to the jury far exceeded the bounds of fair comment.

5. The Government's failure to disclose that one of the major witnesses was under two federal indictments at the time of the trial denied appellant a fair trial.

6. The presumption under 21 U.S.C. § 176a that marihuana is illegally imported and that a possessor has knowledge of illegal importation is arbitrary and irrational in view of the high proportion of marihuana in the United States which is domestically grown.

7. The statutory requirement of a written order form (26 U.S.C. § 4742) and the imposition of a transfer tax (26 U.S.C. § 4741(a)) violate appellant's constitutional privilege against compulsory self-incrimination and render invalid the conviction under Count 3.

8. The District Court erred in refusing to instruct the jury that they could consider as a defense to Count 2, the defendant's honest and sincere belief that he had a right to engage in his activities because of his religious, scientific, or parental beliefs, and that these beliefs could negate the specific intent necessary for conviction under the statute.

Religious freedom, guaranteed by the Constitution, must be weighed with the public interest and the broad power to legislate vested in Congress by the Constitution.[9] Thus the First Amendment "embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." *Cantwell* v. *State of Connecticut*, 310 U. S. 296 (at 303, 304), 60 S. Ct. 900, 84 L. Ed. 1213 (1940). The freedom to act is conditional and relative and Congress may prescribe and enforce certain conditions to control conduct which may be contrary to a person's religious beliefs in the interest of the public welfare and protection of society. See the Supreme Court's decisions in the anti-bigamy cases, *Reynolds* v. *United States*, 98 U. S. 145, 25 L. Ed. 244 (1878); *Davis* v. *Beason*, 133 U.S. 333, 10 S. Ct. 299, 33 L. Ed. 637 (1890), and the Sunday-closing-law cases, *McGowan* v. *State of Maryland*, 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961); *Two Guys From Harrison-Allentown* v. *McGinley*, 366 U.S. 582, 81 S. Ct. 1135, 6 L. Ed. 2d 551 (1961); *Braunfeld* v. *Brown*,

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[9] See Art. I, Sec. 8, United States Constitution; Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part I. The Religious Liberty Guarantee*, 80 Harv. L. Rev. 1381 at 1390 (1967).

366 U.S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961); *Gallagher* v. *Crown Kosher Super Mkt. of Mass.*, 366 U.S. 617, 81 S. Ct. 1122, 6 L. Ed. 2d 536 (1961).

In *Reynolds* v. *United States, supra,* 98 U.S. at 166, the Supreme Court, in denying Mormons an exemption from anti-bigamy laws, said, "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." The Court recognized that religious practice could not be accepted as justification for an overt criminal act; that to permit a man to excuse his unlawful practices because of his religious belief "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." (98 U.S. at 167.)

In *Braunfeld* v. *Brown, supra,* which upheld the constitutional validity of a Pennsylvania Sunday-closing statute, the Court reaffirmed the principles of *Cantwell* v. *State of Connecticut, supra,* and *Reynolds* v. *United States, supra,* with its statement that "the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions" (366 U.S. at 603), and that "legislative power over mere opinion is forbidden but it may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion." (366 U.S. at 603, 604.)[10]

Congress has seen fit to legislate, with appropriate criminal sanctions, concerning the possession, importa-

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[10] See also *Davis v. Beason,* 133 U. S. 333, 342-343, 10 S. Ct. 299, 33 L. Ed. 637 (1890), in which the Supreme Court said: "However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation."

tion, concealment, and taxation of marihuana. The severity of the penalties provided by statute for the violation of these laws provides an insight into the grave concern of Congress to control the use of this drug. The testimony of appellant's witnesses relative to his sincerity of purpose in his religious and scientific endeavors is not pertinent here; nor is the evidence about the so-called harmless nature, the therapeutic value, and the accepted use of marihuana for religious rituals by certain sects in India.

Our concern is with the laws of the United States, which appellant admittedly, knowingly and purposely violated because they conflicted with his personal religious beliefs and practices. Appellant has attempted to demonstrate that the experience he finds through the use of marihuana is the essence of his religion. We do not inquire into the truth or verity of appellant's religious beliefs—to do so would be violative of the Free Exercise Clause of the First Amendment. *United States* v. *Ballard*, 322 U.S. 78, 64 S. Ct. 882, 88 L. Ed. 1148 (1944). But appellant's religious creed and the sincerity of his beliefs are not at issue here. The district judge properly refused an instruction to the jury that they should acquit the defendant if they found his religious practices were in good faith.

Appellant's reliance on *Sherbert* v. *Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963), for authority that the constitutionally guaranteed right of free religious exercise imposes on the Government the burden of showing a compelling interest in its abridgement, is misplaced and inapposite on the facts. In *Sherbert* the Supreme Court held that the disqualification of a member of the Seventh Day Adventist Church for unemployment benefits under the South Carolina Unemployment Compensation Act, because of her refusal to work on Saturday, imposed a burden on the free exercise of her religion. The Court in arriving at its conclusion considered whether there was

"some compelling state interest" in the statute which justified "the substantial infringement of appellant's First Amendment right" (374 U.S. at 406), and found no such state interest.

Here the paramount Government interest in the enforcement of the laws relative to marihuana is the protection of society. We cannot reasonably equate deliberate violation of federal marihuana laws with the refusal of an individual to work on her Sabbath Day and nevertheless claim compensation benefits. The Court in *Sherbert,* while upholding the Free Exercise Clause under the facts of that case, recognized that it had rejected challenges under the same clause "to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.' Braunfeld v. Brown, 366 U.S. 599, 603, 81 S. Ct. 1144, 1146, 6 L. Ed. 2d 563. The conduct or action so regulated have invariably posed some substantial threat to public safety, peace or order. See, e.g., Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244; Jacobson v. Massachusetts, 197 U. S. 11, 25 S. Ct. 358, 49 L. Ed. 643; Prince v. Massachusetts, 321 U. S. 158, 64 S. Ct. 438, 88 L. Ed. 645; Cleveland v. United States, 329 U. S. 14, 67 S. Ct. 13, 91 L. Ed. 12." (374 U. S. at 403.)

The unlawful transportation, possession and use of marihuana falls within the category of cases cited in *Sherbert* which require governmental regulation. "Crime is not the less odious because sanctioned by what any particular sect may designate as 'religion'." *Davis* v. *Beason,* 133 U. S. 333, 345, 10 S. Ct. 299, 33 L. Ed. 637 (1890).

There is no evidence in this case that the use of marihuana is a formal requisite of the practice of Hinduism, the religion which Dr. Leary professes. At most, the evidence shows that it is considered by some as being an aid

to attain consciousness expansion by which an individual can more easily meditate or commune with his god. Even as such an aid, it is not used by Hindus universally.

Congress has made it a crime to traffic in marihuana and it was not incumbent upon the Government to produce evidence to controvert the testimony of witnesses on the controversial question whether use of the drug is relatively harmless. Thus the question is whether the conduct or action so regulated and prohibited under severe criminal penalties by Congress (i.e., trafficking in marihuana) has posed "some substantial threat to public safety, peace or order," *Sherbert, supra,* 374 U. S. at 403. Congress has demonstrated beyond doubt that it believes marihuana is an evil in American Society and a serious threat to its people. It would be difficult to imagine the harm which would result if the criminal statutes against marihuana were nullified as to those who claim the right to possess and traffic in this drug for religious purposes. For all practical purposes the anti-marihuana laws would be meaningless, and enforcement impossible. The danger is too great, especially to the youth of the nation, at a time when psychedelic experience, "turn on," is the "in" thing to so many, for this court to yield to the argument that the use of marihuana for so-called religious purposes should be permitted under the Free Exercise Clause. We will not, therefore, subscribe to the dangerous doctrine that the free exercise of religion accords an unlimited freedom to violate the laws of the land relative to marihuana.

Appellant argues that the religious use of peyote, a psychedelic hallucinogen, by Indians who are members of the Native American Church has been constitutionally protected by the Supreme Court of California in *People* v. *Woody,* 40 Cal. 69, 394 P. 2d 813 (1964). He refers also to the California Supreme Court's decision in *In Re Grady,* 39 Cal. 912, 394 P. 2d 728 (1964), decided the same day

as *Woody*, in which conviction of a "self-styled peyote preacher" for unlawful possession of narcotics, namely, peyote, was annulled and a new trial granted in order that the defendant might have an opportunity to prove that his use of peyote was in connection with an honest and bona fide practice of a religious belief. By parity of reasoning he contends that marihuana, another psychedelic drug, is entitled to the same constitutional protection as peyote. With due deference to the California Supreme Court, we are of course not bound by its decisions. However, we note an essential difference between *Woody* and the instant matter in that peyote in the *Woody* case played "a central role in the ceremony and practice of the Native American Church, a religious organization of Indians," and that the "ceremony marked by the sacramental use of peyote, composes the cornerstone of the peyote religion." Grady was apparently the spiritual leader of a group of individuals and provided peyote for the group which he said was for religious purposes.

We are not impressed that the California cases are directly in point, and we will not apply them insofar as the circumstances of this case are concerned.[11]

In the early case of *State* v. *Big Sheep*, 243 Pac. 1067 (1926), the Montana Supreme Court held, "It was clearly within the power of the Legislature to determine whether the practice of using peyote is inconsistent with the good

[11] The Federal Commissioner of Food and Drugs has exempted peyote from use in bona fide religious ceremonies of the Native American Church. 21 C.F.R., Part 166.3(c). But this would hardly justify our holding, as appellant contends, that the criminal statutes against marihuana are unconstitutional because of religious discrimination. The exemption accorded the use of peyote in the limited bona fide religious ceremonies of the relatively small, unknown Native American Church is clearly distinguishable from the private and personal use of marihuana by any person who claims he is using it as a religious practice.

order, peace, and safety of the state," against the contention that the defendant's religious freedom was infringed. In *State* v. *Bullard*, 267 N. C. 599, 148 S. E. 2d 565, 569 (1966), the North Carolina Supreme Court held, "The defendant may believe what he will as to peyote and marijuana and he may conceive that one is necessary and the other is advisable in connection with his religion. But it is not a violation of his constitutional rights to forbid him, in the guise of his religion, to possess a drug which will produce hallucinatory symptoms similar to those produced in cases of schizophrenia, dementia praecox, or paranoia, and his position cannot be sustained here—in law nor in morals."

The District Court denied appellant's request for a bill of particulars which sought information to ascertain whether it was the Government's intention to rely on his possession of marihuana prior to entry into Mexico or following importation into the United States from Mexico, and whether it was the Government's contention that he was guilty of the overt act of smuggling. The smuggling count was withdrawn from the jury by the court so we turn our attention to Count 2, which charges appellant with transportation and concealment of marihuana after knowledge of importation, and Count 3, which charges transportation and concealment without having paid the necessary transfer tax. Appellant stated that the information requested was necessary to prepare an adequate defense and to avoid the possibility of double jeopardy. Appellant further contended that depending on the theory of the prosecution, different legal defenses would arise, and the requested information was necessary to decide whether he should exercise his right to testify. From a reading of Counts 2 and 3 we conclude that they are not duplicitous. Each count states the date and the place of the offense and adequately apprises appellant of the nature

of the offense charged. Granting or denial of a bill of particulars is a matter within the sound discretion of the trial judge, and will not be interfered with on appeal unless there is abuse or prejudice. *Joseph* v. *United States*, 5 Cir., 1965, 343 F. 2d 755; *Robertson* v. *United States*, 5 Cir., 1959, 263 F. 2d 872; *Johnson* v. *United States*, 5 Cir., 1953, 207 F. 2d 314. There was no such abuse or prejudice here.

Appellant contends, alternatively, that the indictment in this case is fatally insufficient. In this Circuit's decisions in *Thomas* v. *United States*, 314 F. 2d 936 (1963), and *Marquez-Anaya* v. *United States*, 319 F. 2d 610 (1963), the defendants were charged with smuggling marihuana and with transportation of the drug without having paid the necessary tax thereon. Proof was adduced by the Government that the marihuana had been obtained by the defendants in Mexico. The court held in *Thomas*, and reiterated in *Marquez-Anaya*, that an indictment charging transportation and concealment of marihuana without having paid the transfer tax was necessarily predicated upon the defendants having obtained the drug within the United States, and because of the Government's proof to the contrary, that is, that the marihuana had been smuggled by the defendants into the United States from Mexico, the conviction under the tax count could not stand. However, the instant matter is clearly distinguishable from our holdings in *Thomas* and *Marquez-Anaya*. Here, as the case developed, the Government's evidence (through testimony of United States Customs Agent Hatch of statements made to him by the accused) showed that the marihuana was acquired by defendant in the United States. Dr. Leary's own testimony later in the trial was to the same effect and the district judge consequently withdrew the smuggling count from the jury's consideration. The defendant admitted all of the elements of Count 2 except knowledge of importation. The Government, supported by appellant's

own testimony, proved the elements of transportation and concealment of the drug under Count 2, although under the statute it was incumbent on it merely to show possession in order to authorize conviction unless the defendant explained his possession to the satisfaction of the jury. Appellant admitted transporting the marihuana from New York and crossing and recrossing the international border between the United States and Mexico with the marihuana in his possession. He made no effort to explain his possession of the illegal drug to the jury beyond his defense that use of marihuana was a sacramental aid in the practice of his religion—an explanation we have already pointed out is insufficient and immaterial. In addition to the facts proved by the Government, conviction on Count 3 was also justified by appellant's own testimony—his candid admission that he had never paid the required tax as a transferee. The counts were, therefore, neither inconsistent within themselves nor with each other.

There is likewise no merit to appellant's argument that the court's instructions implied that possession, not satisfactorily explained, *compelled* conviction. The court assiduously avoided such an instruction. At the outset the trial judge explained the presumption of innocence which attaches to every defendant brought to trial in a criminal case. He instructed the jury that the Government must prove the accused's guilt beyond a reasonable doubt and defined that term. The district judge quoted the exact provision of the statutory inference in 21 U.S.C. § 176a, i.e., "such possession shall be deemed sufficient evidence as to *authorize* conviction unless the defendant explains his possession to the satisfaction of the jury," (emphasis added), and explained its meaning in the language of the statute by stating: "The means, unless he proves to your satisfaction that it was a lawful and a legitimate possession of the marihuana he had." The court clearly and adequately defined the terms "unlawfully," "knowingly," and "with

intent to defraud" and twice repeated the necessity of the jury finding such elements beyond a reasonable doubt to warrant conviction. The jury was advised of its affirmative duty to acquit in the absence of such findings. We do not construe the court's instructions as *requiring* conviction on evidence of possession of marihuana, but only as *authorizing it.*[12] Appellant's argument is, therefore, untenable,

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[12] Pertinent parts of the judge's instructions to the jury on this question are quoted as follows:

"Now, I instruct you, ladies and gentlemen, that this defendant, as is true of every defendant brought to trial in this court, is presumed at the outset to be innocent.

"The defendant starts off with a clean slate, and by pleading 'Not Guilty,' as he has done here, has imposed upon the Government to prove his guilt to you beyond a reasonable doubt.

"By the term 'reasonable doubt' as I use it here, is meant such a doubt as may arise in your minds when, after fully and impartially considering all of the evidence, the jurors do not feel satisfied to a moral certainty of the accused's guilt.

"A 'reasonable doubt' does not mean a mere possible or imaginary doubt or a mere conjecture; a 'reasonable doubt' is one which appeals to and is based upon your reason.

"If after fully and impartially considering all of the evidence you have a reasonable doubt as to the guilt of the defendant, it's your duty to acquit.

"On the other hand, if after fully and impartially considering all of the evidence you are convinced beyond a reasonable doubt of the guilt, then it's your duty to convict." (R. 591, 592.)

* * *

"Now, I want to read the statutes to you which the defendant is alleged to have violated.

"Section 176(a) of Title 21 of the United States Code, in pertinent part, reads as follows:

"Notwithstanding any other provision of the law, whoever knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced—

"Now, that has to do with Count 1, which I am withdrawing from your consideration.

[Continued on page 22]

especially since he did in fact testify that he knew that his actions were contrary to the laws of the United States.

[Continued from page 21]

". . . or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, shall be punished as the statute thereafter provides.

"With the further paragraph:

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had marihuana in his possession, such possession shall be deemed sufficient evidence as to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

"What that means, of course, is this:

"If the defendant be shown to have had the marihuana in his possession in the United States, such possession shall be deemed sufficient evidence to authorize conviction unless he explains his possession to the satisfaction of the jury. That means, unless he proves to your satisfaction that it was a lawful and a legitimate possession of the marihuana which he had.

"The other statute alleged to have been violated is 4744(a)(2) of Title 26 of the Code, reading in pertinent part as follows:

"It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by Section 4744(a)(1) to acquire or otherwise obtain any marihuana without having paid such tax or, to—and this is the part that we are interested in—to transport or conceal or, in any manner facilitate the transportation or concealment of any marihuana so acquired or obtained. Proof that any person shall have in his possession any marihuana and shall have failed after reasonable notice and demand by the Secretary or his delegate to produce the order form required by Section 4742 to be retained by him, shall be presumptive evidence of guilt under this subsection." (R. 595-598.)

* * *

Appendix A

Appellant contends that the closing arguments to the jury by Government counsel far exceeded the bounds of fair comment, invited prejudice based on educational, economic and regional differences between the accused and the jurors, expressed strong hostility toward him, asserted that he was irresponsible regarding his child's welfare, attacked him for offering a religious defense, bolstered a witness' credibility and generally inflamed the jury's emotions, amounting to plain and reversible error. Pertinent parts

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"And the statute which I have read to you with regard to this third count provides that failure to produce the order form shall be presumptive evidence of guilt under this subsection.

"Now, you might have some difficulty with the question on Count 2 by reason of the fact that the statute requires that the defendant receive—by reason of the fact that the statute provides that one who receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of such marihuana, after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, shall be punished as the statute provides.

"The Government is entitled to rely upon the presumption which I read to you earlier; that is, whenever on trial for a violation of this sub-section the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains his possession to the satisfaction of the jury.

"I mention this a second time because you might be confused about the question of importation.

"We are not talking necessarily about the importation or what the Government contends was importation here at the bridge.

"The defendant has told us that he received the marihuana in New York. This statute, of course, is of application throughout the land and the presumption would still apply that the narcotic had been imported illegally and that he knew it had been imported illegally unless he explains his possession to the satisfaction of the jury." (R. 608-610.)

of the arguments to which objections were made are set forth more fully in the margin below,[18] but they refer principally to the prosecutor's statements that appellant was "irresponsible" (especially with reference to the welfare of his children), his defense was a "colossal hoax," "just hogwash," to Government counsel's statement that "I cannot remember a case I have felt more strongly about

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[18] The following is taken from the final argument of Government counsel to the jury:

"And all this other stuff, I submit, is just hogwash. It's just an attempt to come down here to Laredo, Texas and get a federal jury to believe that because he has got a Ph. D and because he has got a 3,000 acre mansion in Upper New York where they experiment all the time, that he is not subject to the laws of the United States of America.

"And I say to you respectfully and sincerely that it not but hogwash, that Dr. Leary, like everybody else, high, low, black, white—any color—are subject to the laws equally, of the United States. That is one thing that we have that many people in the world do not have. We have a country of law. We are governed by law and we all are subject to the same rules, rich, poor, race, creed or color—makes no difference. The law applies equally to everyone, to all citizens. And that is one great thing about our country." (R. 545, 546.)

* * *

"But after hearing this testimony for several days I don't think there can be any serious question about the fact that this business about psychedelics is not in the encyclopedias and it appears that there has nothing ever been written in print about it except things that he was connected with. This is a hoax and we respectfully submit that they tried to come down here and put off on a good jury of Laredo people a colossal hoax." (R. 551.)

* * *

"To say that this was an unusual case would be a gross understatement, and to say that it's an important case would be a gross understatement, because, ladies and gentlemen, I have participated in what I feel is a considerable number of criminal cases and I cannot remember a case that I have felt more

than I have this case," and his further statement that "I don't mean to shout, for shouting's sake, but I feel so strongly about this case and his acts that I can't help myself."

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strongly about than I have this case, and I will tell you why:" (R. 578.)

* * *

The only semblance of an objection made by defense counsel was that related to Government counsel's reference to defendant's alleged irresponsibility in raising his children. Government counsel stated:

> "What kind of a man are you dealing with? What kind of a man do you have before you here today?
>
> "You have a man that says, 'I believe in bringing up my children the old-fashioned way,' and the 'old-fashioned way', ladies and gentlemen, is to expose them to marihuana, expose them to these other drugs that he has no right to dispense. And that is what we have here.
>
> "Is that irresponsibility?
>
> "I can think of no—no other situation that it can be more irresponsible.
>
> "Mr. Fitzgibbon: If your Honor please. I thought on the question of religion we weren't going to talk on it.
>
> "The Court: Religion?
>
> "Mr. Fitzgibbon: The right to bring up our children. (R. 581, 582.)

The matter was not further pursued by Mr. Fitzgibbon, defense counsel.

Government counsel also stated:

> "But what does he do when he is finally exposed and they find out about it?
>
> "He makes a joke about it. Now, I don't mean to shout, for shouting's sake, but I feel so strongly about this case and his acts that I can't help myself, and I hope that you will forgive me." (R. 585, 586.)

No error is seen in the reference in argument of government counsel to the witness, Cutler, that "there is no reason to disbelieve this man—no motivation for him to falsify or no bad feelings toward Dr. Leary." We discuss the credibility of Cutler and the attempt to impeach him later in this opinion.

Appendix A

The record discloses that no objection to the remarks of the prosecution was made by the several defense counsel either during or after the argument. The issue was, therefore, waived at the time of trial by the defense. See *Fogarty* v. *United States*, 5 Cir., 1959, 263 F. 2d 201, cert. den. 360 U.S. 919, 79 S. Ct. 1437, 3 L. Ed. 2d 1534; *Van Nattan* v. *United States*, 10 Cir., 1966,, 357 F. 2d 161; *United States* v. *Sawyer*, 4 Cir., 1965, 347 F. 2d 372; *United States* v. *Aadal*, 2 Cir., 1966, 368 F. 2d 962.

Judging the case from the viewpoint that most of the evidence which incriminated the accused was admitted and confirmed by him, some resort to emphatic and forceful expression by Government counsel was to be expected. Though the court declined to give the specific charge to the jury requested by appellant that it should acquit appellant if it found his religious claims to be honest and in good faith, it nevertheless permitted Dr. Leary to present his claims fully with reference to his religious and scientific beliefs and to support them with corroborating witnesses. The sincerity of the accused was undoubtedly at issue, and especially his credibility with reference to the possession of marihuana while the defendant was crossing the international border at Laredo. We discern no personal hostility by the prosecution toward the defendant. Though Government counsel's summation of the case at times was strong, a fair reading of the entire argument, taken with the strong evidence of the defendant's guilt largely shown by his own admissions, does not convince us that there was plain error or abuse which affected defendant's substantial right to a fair trial or would justify reversal. Fed. R. Crim. P., Rule 52. That the defendant's teenage daughter was exposed to a home where the free use of marihuana by the family and inhabitants of the household (said to be for religious and scientific purposes) was regular, even routine—but nevertheless in violation of the laws of the country—also permitted the prosecutor more leeway in final argument than might be expected under ordinary circum-

stances, and we are unable to say that zeal overcame fairness.[14]

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[14] The following excerpt from the testimony while Dr. Leary was being interrogated by his counsel (Mr. Fitzgibbon) rather clearly indicates the common use of marihuana in the home and by the family of Dr. Leary:

"Q (By Mr. Fitzgibbon) Now, at home in Millbrook you stated that you used marihuana in the practice of your religion. Do members of your family share this practice and belief with you? A You mean do they smoke marihuaana?

"Q Yes.

"The Court: It that what you are asking him?

"Mr. Fitzgibbon: No, sir. If your Honor please—strike that.

"Q (By Mr. Fitzgibbon) I just have one question about your family here.

Does marihuana play an integral part in your family life in the bringing up of your children—in the raising of your children? Just answer that yes or no. A. Well, the use of psychedelic drugs does.

* * *

"The Court: Well, I believe he may explain. He is apparently having some difficulty making a categorical answer.

"A. (Continuing) You see, I can't explain why it's difficult for me to answer because—

"The Court: I think counsel is interested in the part marihuana plays in your family life.

Is that what you are asking him?

"Mr. Fitzgibbon: Yes, your Honor.

"The Court: You may tell us if yow wish.

"Q (By Mr. Fitzgibbon) We have discussed the science, we have discussed the religion and we have discussed the family. Now, the family life— A Well, I would like to try to make —use two or three sentences to do this, because I am talking about a period of over six years in which the use of marihuana has been somewhat recent.

"Q. Yes, sir. A. Since 1960, since I started working through these experiences, most of the experiences that I was involved in were in my own home. The door of my home has never been locked and no room in my home has ever been locked. Hundreds and hundreds of psychedelic planned drug sessions have been run

Appendix A

Defense counsel attempting to impeach a Government witness, Cutler, who testified on direct examination that he

in my home. My children have always lived with me in my home. From the very beginning of this work I felt that this was a natural, personal, if you will, sacred experience that was not to be secret or behind doors. I couldn't bring—I had to have this—my children be open to this, to see what was going on. My children have walked in the room during perhaps hundreds of psychedelic drug sessions with religious leaders and with philosophers and so forth, in my home.

When we were in Mexico on two occasions, we were doing research with primitive people. My children were with me. So that the use of psychedelic drugs is—and the discussion and the debates about how to use them—this is going on 24 hours a day in my home, so that the integral, central, almost exclusive part of our home life is centered on these spiritual and psychological activities.

"The Court: If I understand you, then, your children have observed and seen what is going on but have not participated? Is that a fair statement?

"The Witness: Yes, sir.

And I also wanted to make the point that marihuana was of a more recent addition and played a minor, but real part, in the last year.

"Q (By Mr. Fitzgibbon) you then think it's an important part of your role as a father to expose, I might say—use the term 'expose' your children to these scientific, psychedelic experiences? A. Yes, sir.

"Q . . . And let them see how religion is carried on in their home? A. Not just religion. It's a way of life. I am very old fashioned about bringing up children. I think that it's the home that determines the child, that the idea of sending your child out to some strangers to be educated—I believe the child should learn his father's trade, if possible or if he wants to, and that he should learn—both the religious and the philosophic and the way of life of his parents so that—

"Q Well, do you believe, then, that every person should have a right to raise their children as they believe? I think that is one of the inalienable rights, not only of our Government but a God-given right to raise your children as best your conscience and your ignorance or wisdom has led you to believe.

"Q The way that you are raising your children at the present time, do you believe that you are raising them according to your beliefs, that you have a right to do so? A I do." (R. 305-309).

had attended a social gathering at Greenwich Village; that Dr. Leary had smoked marihuana at this party, which event occurred prior to the time which Dr. Leary admitted first using the drug. On cross-examination, counsel for the defense asked the witness, "How many times have you been picked up for smoking marihuana?" The question was an attempt to establish a criminal record of the witness and admittedly was asked to impeach his credibility.[15] The court properly sustained Government counsel's objection. Generally, only prior convictions of felonies or of misdemeanors involving moral turpitude are admissible in evidence for the purpose of impeachment of the credibility of a witness. *Roberson* v. *United States*, 5 Cir., 1957, 249 F. 2d 737; *Ramirez* v. *United States*, 9 Cir., 1961, 294 F. 2d 277; *Homan* v. *United States*, 8 Cir., 1960, 279 F. 2d 767,

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[15] The record reveals the cross-examination by Mr. Fitzgibbon for the defense of the witness, Cutler, on this issue as follows:

"And, of course, you were paid by the Government to come down here, were you not? A I wasn't paid by the Government to come down here. My expenses were paid, yes.

"Q Well, it's somewhat of an equivocation. Your expenses were paid to come down? A Yes. But I am receiving no salary or anything like that.

"Q You receive a certain amount of money per day, do you not? A Yes. I believe so.

"Q So you are being paid, then?

Now, what—how many times have you been picked up for smoking marihuana?

"Mr. Susman: We object to that, your Honor.

"The Court: Are you undertaking to impeach the credibility of the witness? If you are, you may prove it by a prior conviction of felony.

"Mr. Fitzgibbon: Yes, your Honor.

"Q (By Mr. Fitzgibbon) Have you been convicted of a felony in this state or any other state? A No. I have not.

"Q You have not?

"Mr. Fitzgibbon: Pass the witness." (R. 461, 462.)

cert. den. 364 U.S. 866, 81 S. Ct. 110 5 L. Ed. 2d 88 (1960); *Beasley* v. *United States*, D.C. Cir., 1954, 218 F. 2d 366, cert. den. 349 U.S. 907, 75 S. Ct. 584, 99 L. Ed. 1243 (1955); *United States* v. *Bell*, 6 Cir., 1965, 351 F. 2d 868. The trial court has wide discretion to limit cross-examination, *Roberson* v. *United States*, *supra*, and the exercise of such discretion should not be interfered with in the absence of a showing of prejudice to the defendant. *Alderman* v. *United States*, 5 Cir., 1929, 31 F. 2d 499; *Foster* v. *United States*, 10 Cir., 1960, 282 F. 2d 222. We ascribe no prejudice to the court's ruling. The jury was free to accept or reject the witness' testimony on this peripheral issue and was so instructed by the court. Cutler was not a major witness, though he was used by the prosecution on rebuttal to impeach Dr. Leary's testimony as to when he first began using marihuana. It is most unlikely that Cutler's statement had any substantial effect on the verdict in view of the defendant's own testimony that he frequently used marihuana, knowing it to be illegal, even if such use was purportedly for scientific or religious purposes.

Now, for the first time, on appeal, appellant states that Cutler was, at the time of trial when he testified, under indictment in the United States Court, Southern District of California, for smuggling marihuana into the United States from Mexico, and for bail jumping in connection with this charge; that this fact was known to the Government and not disclosed to Dr. Leary's counsel. The Government's answer is that Cutler had no prior convictions, had not been tried as yet on the California federal cases, and that if defense counsel had asked for this information it would have been given. We observe that the pending charges against Cutler are in no way connected with the present case, and that no attempt was made by counsel at the trial to go into any relationship between the witness and the

prosecution which might have reflected on his credibility, except to show that the Government paid his expenses to come to Laredo to testify. There was obviously no suppression by the Government of Cutler's criminal record for there were no convictions against him when he testified, nor did the pending cases in California relate in any way to the present prosecution. The contention is without merit.

Appellant contends that the presumption under 21 U.S.C. § 176a, that marihuana is illegally imported and that a possessor has knowledge of illegal importation, is arbitrary and irrational in view of his contention that a high proportion of marihuana in the United States is domestically grown. To prove his point he has compiled certain statistics in published annual reports of the Bureau of Narcotics, 1957-1964, inclusive. This proof was not offered at the trial of the case and we assume we are asked to take judicial cognizance of information found in these public reports. By process of reasoning, appellant's counsel states that of all the marihuana in the United States well over 99 percent has been domestically grown. Of course, the Bureau of Narcotics reports make no such statement and we are not impressed that it is correct. Obviously the information found in appellant's brief is incomplete for undoubtedly much marihuana from outside the United States does reach this country. Appellant does not purport to tell us what this amount is or to estimate it beyond his own rationalization of certain statistics he has assembled from published reports. No reference is made to seizures by state authorities nor is any provision suggested for the amount of marihuana which comes into the United States undetected. In other published reports which are equally available to the Court as are the Bureau of Narcotics annual reports relied on by appellant, United States Commissioner of Narcotics, Henry L. Giordano, testified before the House of Representatives Subcom-

mittee of the Committee on Appropriations, on February 8, 1967, that "most of our marihuana comes from Mexico."[16] This official statement, which is in direct contradiction to the conclusions in exhibits prepared by appellant's counsel, shows rather well that appellant's information, submitted for the first time on brief, and not the subject of proof contradictorily at trial, is neither complete nor convincing.

In *Caudillo* v. *United States*, 9 Cir., 1958, 253 F. 2d 513, the Ninth Circuit upheld the constitutionality of the presumption in 21 U.S.C. § 176a, that marihuana is illegally imported and the possessor has knowledge of importation.[17] The court noted the necessity under the requirements of *Tot* v. *United States*, 319 U. S. 463, 63 S. Ct. 1241, 87 L.

[16] See Extracts from Treasury-Post Office Departments and Executive Office Appropriations for 1968, Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, 90th Cong., 1st Sess., p. 457, testimony of Mr. Giordano: "One of the problems, of course, is that most of our marihuana comes from Mexico. It is quite easy to smuggle it across the border and distribute it."

See also statement of Mr. Giordano, United States Commissioner of Narcotics at Hearings of the Special Senate Subcommittee on Narcotics of the Committee on the Judiciary, June 14, 1966, relative to the Narcotic Rehabilitation Act of 1966, in pertinent part as follows: "Large quantities of marihuana grown illicitly in Mexico are smuggled across the border into the United States. Although marihuana grown in the United States is occasionally found in the traffic, the Mexican variety, preferred by users, is most prevalent in the United States marihuana traffic."

[17] See also *Borne v. United States*, 5 Cir., 1964, 332 F. 2d 565; *Claypole v. United States*, 9 Cir., 1960, 280 F. 2d 768; Brown, *The Constitutionality of Statutory Criminal Presumptions, Modern Practice Commentator*, Vol. V, No. 1, p. 92, May 1967. Cf. *Maltos-Roque v. United States*, No. 23995, 5 Cir., decided July 12, 1967, . . . F. 2d. . . .

Ed. 1519 (1943), of rational connection between the facts proved and the ultimate fact presumed, and said:

> "Though there might be differences of opinion, it can reasonably be argued that the facts of marihuana importation are so well-known, particularly to marihuana users, that there is a 'rational connection between the fact proved and the ultimate fact presumed.' "

The Ninth Circuit in *Caudillo* also pointed out, "The statutory language in question has long existed in the narcotic laws" and was upheld by the Supreme Court in *Yee Hem* v. *United States*, 268 U. S. 178, 45 S. Ct. 470, 69 L. Ed. 904 (1925), in reference to opium. The court said that as to marihuana, "If experience is the test of the validity of an inference, then the legislatively created inference in this case is well supported." 253 F. 2d at 517.

We believe, as was expressed so well in *United States* v. *Gainey*, 380, U.S. 63, 67, 85 S. Ct. 754, 13 L. Ed. 2d 658 (1965):

> "The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it."

That being true, and with the benefit of the legislative history to which we have already referred, it is clear that the experience of Congress shows that it is gravely concerned with the smuggling, transportation, concealment and possession of imported marihuana. When Congress passed the Marihuana Tax Act of 1937 from which are derived

certain provisions of the United States Code involved here, i. e., 26 U.S.C. §§ 4741, 4742, and 4744, extensive Congressional hearings preceded the passage of the Act. They are referred to in appellant's brief as Hearings before the Committee on Ways and Means, 75th Cong., 1st Sess., H. R. 6385 (1937). The report of the proceedings shows unmistakably that Congress intended "to discourage the current and widespread undesirable use of marihuana," and that the development of a scheme of taxation would "render virtually impossible the acquisition of marihuana by persons who would put it to illicit uses." Witnesses referred to the "injurious effect it has upon the public health and morals of this country," especially for younger people who are attracted to it. The then Commissioner of Narcotics, Mr. Anslinger, said, "This drug is entirely the monster Hyde, the harmful effect of which cannot be measured." He pointed out that all of the states had passed laws against marihuana. Numerous expert witnesses referred to the dangerous nature of the drug, its effect on those who use it, to criminal episodes of terrible character which accompanied its use. The evidence was voluminous and convincing that marihuana is a serious evil to society. Thus did Congress wisely and prudently enact this law and clearly meet the "compelling state interest" test imposed in *Sherbert* v. *Verner*, 374 U. S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963).[18]

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[18] See also additional legislative history supporting the propriety of anti-marihuana enactments by Congress: 1956 U. S. Code, Cong. & Adm. News, p. 3274, relative to the Narcotic Control Act of 1956 (when the legislative presumption was included which made the unexplained possession of marihuana by the defendant sufficient evidence for conviction); 1951 U.S. Code, Cong. & Adm. News, p. 2602, in which the Narcotic Drugs Import & Export Act and the Internal Revenue laws relative to narcotics was amended in order to provide greater uniformity of penalties for violations of those laws.

Appendix A

Appellant contends that 26 U.S.C. § 4741(a), which imposes a tax on all transfers of marihuana, and 26 U.S.C. § 4742, which requires that such transfers be accompanied by written order forms issued by the Secretary of the Treasury, are unconstitutional in that they violate the Fifth Amendment privilege against compulsory self-incrimination. He argues, therefore, that his conviction under Count 3, which charged that defendant transported and concealed marihuana, being a transferee required to pay a transfer tax, in violation of 26 U.S.C. § 4744(a), is invalid. This Circuit has had occasion to rule on this precise point in *Haynes* v. *United States*, 5 Cir., 1964, 339 F. 2d 30, cert. den. 380 U. S. 924, 85 S. Ct. 926 (1965), in which the court found no merit to the contention "that the appellant was required to incriminate himself by registration and payment of taxes and, hence, that the statutes under which he was convicted are unconstitutional. . . ."[19]

We find, without merit, appellant's final point of error that the District Court erred in refusing to instruct the

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[19] See also *Rule v. United States*, 5 Cir., 1966, 362 F. 2d 215, which upheld the constitutionality of 21 U.S.C. § 176a against an attack that the statute violated the Fifth Amendment privilege against self-incrimination; *Manning v. United States*, 5 Cir., 1960, 274 F 2d 926, which upheld the constitutionality of the presumption in 26 U.S.C. § 4744(a) of guilt in failing to pay the transfer tax on marihuana (which presumption arises from failure to produce the required order forms) against an attack that due process had been violated; *Palma v. United States*, 5 Cir., 1958, 261 F. 2d 93, which upheld the constitutionality of 18 U.S.C. § 1407—which statute requires that a United States citizen, who has been convicted of violating a narcotics law under certain circumstances, register prior to departure from or entry into the United States—against attacks of unreasonable search and seizure under the Fourth Amendment, self-incrimination, lack of due process, vague and indefinite standards and restraint of civil liberty, under the Fifth Amendment, and cruel and unusual punishment under the Eighth Amendment; and *Reyes v. United States*, 9 Cir., 1958, 258 F. 2d 774, which upheld the constitutionality of the same statute, 18 U.S.C. § 1407.

jury that they could consider as a defense to Count 2 defendant's honest and sincere belief that he had a right to possess marihuana in violation of the law because of his religious and scientific beliefs. Appellant argues that the jury could have found, if so instructed by the court, that this belief negated the specific intent necessary under 21 U.S.C. § 176a. This point is in effect substantially similar to those contentions of appellant which we have already considered and rejected relating to the defense of religious claims that appellant was honest and in good faith in his use of marihuana, and to the contention that the presumption in Section 176a that possession of marihuana is sufficent evidence to authorize conviction unless explained by the defendant to the satisfaction of the jury is unconstitutional.

AFFIRMED.

APPENDIX B

Opinion of the United States Court of Appeals for the Fifth Circuit denying Petition for Rehearing

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 23570

TIMOTHY LEARY,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Texas

(March 29, 1968)

ON PETITION FOR REHEARING EN BANC

Before:

GEWIN and AINSWORTH, *Circuit Judges*, and LYNNE, *District Judge*.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 25(a), subpar. (b), the Petition for Rehearing En Banc is DENIED.

Appendix B

In a supplementary petition for rehearing, appellant calls attention to three recent Supreme Court decisions rendered on January 29, 1968 (subsequent to our original opinion in this case, 383 F. 2d 851), in *Marchetti v. United States*, — U.S. —, — S. Ct. —; *Grosso v. United States*, — U.S. —, — S. Ct. —; and *Haynes v. United States*, — U.S. —, — S. Ct. —, and makes the contention that because of these holdings his conviction must be reversed on Count 3 of the indictment, which charged the transportation of marihuana as a transferee without having paid the transfer tax and without having secured and furnished the written order forms of the Secretary of the Treasury required by statute. See 26 U.S.C. §§ 4741(a), 4742, 4744(a). Appellant's position is that the statutory provisions referred to violate the Fifth Amendment privilege against self-incrimination, and that though this contention was rejected by us in our original opinion, the new rulings of the Supreme Court in *Marchetti*, *Grosso* and *Haynes* now compel a holding that the conviction on Count 3 is invalid because it is based on unconstitutional statutory provisions. From this it is contended that the arguments made and charge to the jury relating to Count 3 matters have necessarily prejudiced appellant's entire case, including his defense to Count 2, which charged a violation of 21 U.S.C. § 176a in transporting and facilitating the transportation and concealment of marihuana.

The Supreme Court set aside the conviction in *Marchetti*, which charged violations of the Federal Wagering Tax Statutes for evading payment of the annual occupational tax imposed by 26 U.S.C. § 4411 and for wilfully failing to register before engaging in the business of accepting wagers, as required by 26 U.S.C. § 4412. In *Grosso*, the conviction for wilful failure to pay the excise tax on wagering imposed by 26 U.S.C. § 4401, and for failure to pay the special occupational tax imposed by 26 U.S.C. § 4411, was reversed. In *Haynes*, the conviction for

violating 26 U.S.C. § 5851 in knowingly possessing a firearm, as defined by 26 U.S.C. § 5848(1), which had not been registered with the Secretary of the Treasury, as required by 26 U.S.C. § 5841, was reversed.

Appellant thus contends that these new Supreme Court decisions now require a reversal of the Count 3 conviction in that the appellant's transportation of marihuana, without having paid the transfer tax and without having secured and furnished the written order forms of the Secretary of the Treasury, is analogous to the statutory provisions relative to possessing an unregistered firearm referred to in *Haynes*, and to the statutory provisions relating to registration and occupational tax in connection with wagering activities referred to in *Marchetti* and *Grosso*. Appellant argues that the federal statutory provisions relating to marihuana, of which he stands convicted, thus penalize an individual's refusal so to incriminate himself.

We disagree with appellant's contentions because we believe the holdings in *Marchetti*, *Grosso* and *Haynes* are clearly distinguishable from the instant case.

The United States points out in its response to appellant's supplementary petition for rehearing that the statutes involved in the new Supreme Court cases differ from the marihuana statutes here in that under the former there are no licensing provisions and activities thereunder are always unlawful. The possession of marihuana, however, is not per se a crime. Under the law of Texas where the crime was committed, marihuana may be lawfully possessed under the law of that state by pharmacists, physicians and others. See Vernon's Texas Penal Code Art. 725b. The same is true under federal statutes where marihuana may be lawfully possessed. See 26 U.S.C. §§ 4741-4757 and 4771-4775. See also *United States v. Sanchez*, 340 U.S. 42, 71 S. Ct. 108 (1950).

In *Marchetti*, the Supreme Court also said (— U.S. —):

> "We emphasize that we do not hold that these wagering tax provisions are as such constitutionally im-

permissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements. If, in different circumstances, a taxpayer is not confronted by substantial hazards of self-incrimination, or if he is otherwise outside the privilege's protection, nothing we decide today would shield him from the various penalties prescribed by the wagering tax statutes."

Here, appellant took the stand and affirmatively waived the privilege against self-incrimination by testifying fully to the details of his acquisition and transportation of marihuana without having paid the tax or having secured the Treasury written order forms.

We reaffirm our prior ruling on this issue (based on several former decisions of this Court, namely, *Haynes v. United States,* 5 Cir., 1964, 339 F. 2d 30, cert. denied, 380 U.S. 924, 85 S. Ct. 926 (1965); *Rule v. United States,* 5 Cir., 1966, 362 F. 2d 215; and *Manning v. United States,* 5 Cir., 1960, 274 F. 2d 926) that the statutory provisions relating to marihuana (26 U.S.C. §§ 4741(a), 4742 and 4744(a)) which require that transfers of marihuana be accompanied by written order forms issued by the Secretary of the Treasury, in payment of the transfer tax, are not unconstitutionally violative of the Fifth Amendment privilege against compulsory self-incrimination.

Appellant's other contentions in his petition for rehearing have been fully considered and are amply discussed and disposed of in our original opinion.

Rehearing DENIED; rehearing en banc DENIED.

APPENDIX C

Judgment of the United States Court of Appeals for the Fifth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1966

No. 23570

D. C. Docket No. 66-L-37 Cr.

TIMOTHY LEARY,

Appellant,

VERSUS

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS.

Before:

GEWIN and AINSWORTH, *Circuit Judges*, and LYNNE, *District Judge*.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

September 29, 1967

Issued as Mandate: April 8, 1968

APPENDIX D

Order of the United States Supreme Court Granting Certiorari

UNITED STATES SUPREME COURT

OCTOBER TERM, 1967

No. 1365

TIMOTHY F. LEARY

Appellant,

VERSUS

UNITED STATES OF AMERICA

Appellee.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

The petition for a writ of certiorari is granted limited to Questions 1 and 4, presented by the petition which read as follows:

I. Whether the registration and tax provisions in 26 U.S.C. Sections 4741(a), 4742 and 4744(a), as applied to Petitioner, violate his privilege against self incrimination protected by the Fifth Amendment to the United States Constitution and his rights thereunder as amplified by this Court in three recently decided cases: *Marchetti* v. *U.S.*, 390 U.S. 39 (1968); *Grosso* v. *U.S.*, 390 U.S. 62 (1968); and *Haynes* v. *U.S.*, 390 U.S. 85 (1968).

IV. Whether Petitioner was denied due process under the Fifth Amendment by the application, under the circumstances of this case, of the provisions of 21 U.S.C. § 176a, providing that an inference may be drawn respecting the illegal origin and nature of marihuana solely from possession thereof.

The case is placed on the summary calendar.

June 10, 1968

APPENDIX E

Constitutional, Statutory and Regulatory Provisions Involved

A. Constitutional Provisions:

Amendment V to the Constitution of the United States of America:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

B. Statutory Provisions:

§ 176a. SMUGGLING OF MARIHUANA; PENALTIES; EVIDENCE; DEFINITION OF MARIHUANA

Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense

(as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

As used in this section, the term "marihuana" has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954.

§ 4741. IMPOSITION OF TAX

(a) *Rate.*—There shall be imposed upon all transfers of marihuana which are required by section 4742 to be carried out in pursuance of written order forms taxes at the following rates:

(1) *Transfers to special taxpayers.*—Upon each transfer to any person who has paid the special tax and registered under sections 4751 to 4753, inclusive, $1 per ounce of marihuana or fraction thereof.

(2) *Transfers to others.*—Upon each transfer to any person who has not paid the special tax and registered under sections 4751 to 4753, inclusive, $100 per ounce of marihuana or fraction thereof.

(b) *By whom paid.*—Such tax shall be paid by the transferee at the time of securing each order form and shall be in addition to the price of such form. Such transferee shall be liable for the tax imposed by this section but in the event that the transfer is made in violation of section 4742 without an order form and without payment of the transfer tax imposed by this section, the transferor shall also be liable for such tax.

Appendix E

§ 4742. ORDER FORMS

(a) *General requirement.*—It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate.

(b) *Exceptions.*—Subject to such regulations as the Secretary or his delegate may prescribe, nothing contained in this section shall apply—

(1) *Professional practice.*—To a transfer of marihuana to a patient by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4753, in the course of his professional practice only: *Provided,* That such physician, dentist, veterinary surgeon, or other practitioner shall keep a record of all such marihuana transferred, showing the amount transferred and the name and address of the patient to whom such marihuana is transferred, and such record shall be kept for a period of 2 years from the date of the transfer of such marihuana, and subject to inspection as provided in section 4773.

(2) *Prescriptions.*—To a transfer of marihuana, made in good faith by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, veterinary surgeon, or other practioner registered under section 4753: *Provided,* That such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, veterinary surgeon, or other practitioner who issues the same: *Provided further,* That such dealer shall preserve such prescription for a period

of 2 years from the day on which such prescription is filled, so as to be readily accessible for inspection by the officers, employees, and officials mentioned in section 4773.

(3) *Exportation.*—To the sale, exportation, shipment, or delivery of marihuana by any person within the United States, any Territory, the District of Columbia, or any of the insular possessions of the United States, to any person in any foreign country regulating the entry of marihuana, if such sale, shipment, or delivery of marihuana is made in accordance with such regulations for importation into such foreign country as are prescribed by such foreign country, such regulations to be promulgated from time to time by the Secretary of State of the United States.

(4) *Government and state officials.*—To a transfer of marihuana to any officer or employee of the United States Government or of any State, Territorial, District, county, or municipal or insular government lawfully engaged in making purchases thereof for the Department of Defense, the Public Health Service, and for Government, State, Territorial, District, county, or municipal or insular hospitals or prisons.

(5) *Certain seeds.*—To a transfer of any seeds of the plant Cannabis sativa L. to any person registered under section 4753.

(c) *Supply.*—The Secretary or his delegate shall cause suitable forms to be prepared for the purposes mentioned in this section and shall cause them to be distributed to each internal revenue district for sale. The price at which such

forms shall be sold shall be fixed by the Secretary or his delegate, but shall not exceed 2 cents each. Whenever any of such forms are sold, the Secretary or his delegate shall cause the date of sale, the name and address of the proposed vendor, the name and address of the purchaser, and the amount of marihuana ordered to be plainly written or stamped thereon before delivering the same.

(d) *Preservation.*—Each such order form sold by the Secretary or his delegate shall be prepared to include an original and two copies, any one of which shall be admissible in evidence as an original. The original and one copy shall be given to the purchaser thereof. The original shall in turn be given by the purchaser thereof to any person who shall, in pursuance thereof, transfer marihuana to him and shall be preserved by such person for a period of 2 years so as to be readily accessible for inspection by an officer or employee mentioned in section 4773. The copy given to the purchaser shall be retained by the purchaser and preserved for a period of 2 years so as to be readily accessible to inpection by any officer or employee mentioned in section 4773. The second copy shall be preserved in the records of the internal revenue district.

(e) *Exemption of certain transfers to millers.*—Nothing in the section shall apply to a transfer of the plant Cannabis sativa L. or any parts thereof from any person registered under section 4753 to a person who is also registered under section 4753 as a taxpayer required to pay the tax imposed by paragraph (6) of section 4711 Aug. 16, 1954, c. 736, 68A Stat. 560.

§ 4743. Affixing of stamps

The stamps provided in section 4771(a)(1) for marihuana shall be affixed by the Secretary or his delegate to the original order form. Aug. 16, 1954, c. 736, 68A Stat. 562.

Appendix E

§ 4744. UNLAWFUL POSSESSION

(a) *Persons in general.*—It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741 (a)—

(1) to acquire or otherwise obtain any marihuana without having paid such tax, or

(2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.

Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a).

(b) *Government and state officials.*—No liability shall be imposed by virtue of this section upon any duly authorized officer of the Treasury Department engaged in the enforcement of this part, or upon any duly authorized officer of any State, or Territory, or of any political subdivision thereof, or the District of Columbia, or of any insular possession of the United States, who shall be engaged in the enforcement of any law or municipal ordinance dealing with the production, sale, prescribing, dispensing, dealing in, or distributing of marihuana.

§ 4751. IMPOSITION OF TAX

Every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, prescribes, administers, or gives away marihuana shall before engaging in any of the above-mentioned activities, and thereafter on or be-

fore July 1 of each year, pay the following special taxes respectively:

(1) *Importers, manufacturers, and compounders.*—Importers, manufacturers, and compounders of marihuana, $24 a year;

(2) *Producers.*—Producers of marihuana (except those included within paragraph (4)), $1 a year, or fraction thereof, during which they engage in such activity;

(3) *Physicians, dentists, veterinary surgeons, and other practitioners.*—Physicians, dentists, veterinary surgeons, and other practitioners who distribute, dispense, give away, administer, or prescribe marihuana to patients upon whom they in the course of their professional practice are in attendance, $1 a year, or fraction thereof, during which they engage in any of such activities;

(4) *Persons engaged in research, instruction, or analysis.*—Any person not registered as an importer, manufacturer, producer, or compounder who obtains and uses marihuana in a laboratory for the purpose of research, instruction, or analysis, or who produces marihuana for any such purpose, $1 a year, or fraction thereof, during which he engages in such activities;

(5) *Persons not otherwise taxed.*—Any person who is not a physician, dentist, veterinary surgeon, or other practitioner and who deals in, dispenses, or gives away marihuana, $3 a year: *Provided*, That any person who has registered and paid the special tax as an importer, manufacturer, compounder, or producer, as required by paragraphs (1) and (2), may deal in, dispense, or give away marihuana imported, manufactured, compounded, or produced by

him without further payment of the tax imposed by this section;

(6) *Millers.*—Any person who at a mill manufactures or produces from the plant Cannabis sativa L. any fiber or fiber products, $1 a year, or fraction thereof, during which he engages in such activities.

§ 4752. COMPUTATION AND LIABILITY FOR TAX

(a) *Computation of tax.*—Where a tax under paragraph (1) or (5) of section 4751 is payable on July 1 of any year it shall be computed for 1 year; where any such tax is payable on any other day it shall be computed proportionately from the first day of the month in which the liability for the tax accrued to the following July 1.

(b) *Liability in case of activities in more than one place.*—In the event that any person subject to a tax imposed by section 4751 engages in any of the activities enumerated in such section at more than one place, such person shall pay the tax with respect to each such place.

(c) *Liability in case of more than one activity by same person at same time.*—Except as otherwise provided, whenever more than one of the activities enumerated in section 4751 is carried on by the same person at the same time, such person shall pay the tax for each such activity, according to the respective rates prescribed. Aug. 16, 1954, c. 736, 68A Stat. 563.

§ 4753. REGISTRATION

(a) *In general.*—Any person subject to the tax imposed by section 4751 shall, upon payment of such tax, register his name or style and his place or places of business with the official in charge of the internal revenue district in which such place or places of business are located.

(b) *Special requirements for millers.*—The Secretary or his delegate shall not permit the registration of any person under this section as a person required to pay the tax imposed by paragraph (6) of section 4751, unless in the opinion of the Secretary or his delegate such person (or if a corporation, each officer thereof) is a person of good moral character and unless in the opinion of the Secretary or his delegate such person is a person of suitable financial standing, intends to engage in good faith in the business of manufacturing or producing fiber or fiber products from the plant Cannabis sativa L. on a commercial basis, and is not seeking registration under this section for the purpose of facilitating the unlawful diversion of marihuana. Any person who is registered under this section and has paid the tax imposed by paragraph (6) of section 4751 shall afford officers and employees designated by the Secretary or his delegate ready access at all times to any part of the premises of the mill or other premises of such person and the right to inspect any and all books, papers, records, or documents connected with the activities of such person in dealing in, manufacturing, and processing Cannabis sativa L. and fiber or fiber products thereof, and the handling of marihuana. The Secretary or his delegate may cancel or may refuse to renew, after notice and opportunity for hearing, the registration of any such person if he finds that such person has not complied or is not complying with the requirements of this subsection, or if he finds that grounds exist which would justify the refusal to permit the original registration of such person under this section. Aug. 16, 1954, c. 736, 68A Stat. 564.

§ 4754. Returns

(a) *Registrants.*—Any person who shall be registered under the provisions of section 4753 with the Secretary or his delegate shall, whenever required to do so by the Secretary or his delegate, render a true and correct statement or return, verified by affidavits, setting forth the quantity

of marihuana received or harvested by him during such period immediately preceding the demand of the Secretary or his delegate, not exceeding 3 months, as the Secretary or his delegate may fix and determine. If such person is not solely a producer, he shall set forth in such statement or return the names of the persons from whom said marihuana was received, the quantity in each instance received from such persons, and the date when received.

§ 4755. Unlawful Acts in Case of Failure to Register and Pay Special Tax

(a) *Trafficking.*—

(1) *Liability.*—It shall be unlawful for any person required to register and pay the special tax under the provisions of sections 4751 to 4753, inclusive, to import, manufacture, produce, compound, sell, deal in, dispense, distribute, prescribe, administer, or give away marihuana without having so registered and paid such tax.

(2) *Enforcement of liability.*—In any suit or proceeding to enforce the liability imposed by this section or sections 4751 to 4753, inclusive, if proof is made that marihuana was at any time growing upon land under the control of the defendant, such proof shall be presumptive evidence that at such time the defendant was a producer and liable under this section as well as under sections 4751 to 4753, inclusive.

(b) *Transportation.*—Except as otherwise provided in this subsection, it shall be unlawful for any person to send, ship, carry, transport, or deliver any marihuana within any Territory, the District of Columbia, or any insular possession of the United States, or from any State, Territory, the District of Columbia, or any insular possession of the United States into any other State, Territory, the District

of Columbia, or insular possession of the United States. Nothing contained in this subsection shall apply—

(1) to any person who shall have registered and paid the special tax as required by sections 4751 to 4753, inclusive;

(2) to any common carrier engaged in transporting marihuana;

(3) to any employee acting within the scope of his employment for any person who shall have registered and paid the special tax as required by sections 4751 to 4753, inclusive, or to any contract carrier or other agent acting within the scope of his agency for such registered person;

(4) to any person who shall deliver marihuana which has been prescribed or dispensed by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4753 and employed to prescribe for the particular patient receiving such marihuana;

(5) to any person carrying marihuana which has been obtained by the person from a registered dealer in pursuance of a written prescription referred to in section 4742(b) (2), issued for legitimate medical uses by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4753, if the bottle or other container in which such marihuana is carried bears the name and registry number of the druggist, serial number of prescription, name and address of the patient, and name, address, and registry number of the person issuing such prescription;

(6) to any person carrying marihuana which has been obtained by the person as a patient from a registered physician, dentist, or other practitioner in the course of his professional practice if such marihuana

is dispensed to the patient for legitimate medical purposes; or

(7) to any United States, State, county, municipal, District, Territorial, or insular officer or official acting within the scope of his official duties.

§ 4773. INSPECTION OF RETURNS, ORDER FORMS, AND PRESCRIPTIONS

The duplicate order forms and the prescriptions, including the written record of oral prescriptions, required to be preserved under the provisions of section 4705(c) (2) and (e), and the order forms and copies thereof and the prescriptions and records required to be preserved under the provisions of section 4742, in addition to the statements or returns filed in the office of the official in charge of the internal revenue district under the provisions of sections 4732 (b) or 4754, shall be open to inspection by officers and employees of the Treasury Department duly authorized for that purpose, and such officials of any State or Territory, or of any organized municipality therein, or of the District of Columbia, or any insular possession of the United States, as shall be charged with the enforcement of any law or municipal ordinance regulating the production of marihuana or regulating the sale, prescribing, dispensing, dealing in, or distribution of narcotic drugs or marihuana. The Secretary or his delegate is authorized to furnish, upon written request, certified copies of any of the said statements or returns filed in the office of any official in charge of an internal revenue district to any of such officials of any State or Territory or organized municipality therein, or the District of Columbia, or any insular possession of the United States as shall be entitled to inspect the said statements or returns filed in the office of the official in charge of the internal revenue district, upon the payment of a fee of $1 for each 100 words or fraction thereof in the

copy or copies so requested. Aug. 16, 1954, c. 736, 68A Stat. 567; Aug. 31, 1954, c. 1147, § 9, 68 Stat. 1004.

§ 4775. LIST OF SPECIAL TAXPAYERS

The Secretary or any officer or employee designated by him is authorized to furnish upon written request, to any person, a certified copy of the names of any or all persons who may be listed in the respective internal revenue districts as special taxpayers under the provisions of sections 4721 to 4726, inclusive, section 4702(a), section 4751, or section 4752, upon payment of a fee of $1 for each 100 names or fraction thereof in the copy so requested. Aug. 16, 1954, c. 736, 68A Stat. 568.

C. Regulatory Provisions:

26 C.F.R. 152.61 provides:
Scope of tax.

Except as otherwise provided, each transfer of marihuana to a person within the United States is subject to tax, to be paid in the manner hereinafter indicated. The tax is due whether the transferor be located within the United States or elsewhere. The tax applies to every transfer, no matter how often the same material may be transferred. It is no basis of exemption that a transferred article was produced from material on the transfer of which tax was paid.

26 C.F.R. 152.62 provides:
Amount of tax.

Where the transfer is to a taxable person who has duly registered and paid special tax, the transfer tax is at the rate of $1 per ounce or fraction thereof. If the transfer is to a person who has not registered and paid the special tax under this act, tax at the rate of $100 per ounce or fraction thereof is due.

Appendix E

26 C.F.R. 152.63 provides:
Method of payment.

The tax is paid by attachment of adhesive stamps to order forms as hereinafter shown. Stamps of various denominations are available. Payment for the stamps shall be made when application for the order form is submitted.

26 C.F.R. 152.64 provides:
Affixing and canceling of stamps.

The proper stamp, evidencing the payment of the transfer tax, shall be affixed to the original order form by the district director or his representative, and the person so affixing the stamp shall cancel it by writing or stamping thereon, in ink, his initials, and the day, month, and year, or shall, by cutting with a machine or punch affix his initials and the date as aforesaid, in such manner as to render it unfit for reuse. The cancellation shall not so deface the stamp as to prevent its denomination and genuineness from being readily determined.

26 C.F.R. 152.65 provides:
Reuse of stamps prohibited.

A stamp once affixed to one order form cannot lawfully be removed and affixed to another. As to refunds for amounts paid for stamps, see § 152.124.

26 C.F.R. 152.66 provides:
Written order required for transfer of marihuana.

Except as otherwise provided, every person seeking to obtain marihuana shall make application on Form 679a (Marihuana) to the district director of internal revenue for the district in which the transferee is located for the purchase of an order form. The application shall show (a) the transferee's

name, address, and, if registered, the registration number, (b) the name and address of the transferor, and (c) a description, including quantities, of the desired articles or materials to be transferred. The application must be accompanied by a check, cash, or money order in payment of the transfer tax (see § 152.62), plus 2 cents in payment for the order form.

26 C.F.R. 152.67 provides::
Signing of application.

Generally, applications for order forms shall be signed by the same person or persons signing the application for registration (see § 152.25). However, when it is impracticable for the person signing the application for registration to sign the applications for order forms they may be signed by another person, provided a power of attorney authorizing such other person to sign the applications for order forms has previously been filed with and approved by the district director. The power of attorney shall be executed on Form 1315, or a substantially similar form, in the same manner as applications for registration, shall show the signature of the person thereby authorized to sign applications for order forms, and shall affirm that the signature as shown is his signature.

26 C.F.R. 152.68 provides:
Signatures to be compared.

Upon receipt by the district director of an application for an order form the signature on such application shall be compared with that appearing on the application for registration or in the power of attorney (see § 152.67). Unless the district director is satisfied that the application is authentic it will not be honored.

APPENDIX F

Portions of The Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

(LAREDO DIVISION)

Criminal No. 66-L-37

RELEVANT DOCKET ENTRIES

2/ 1/66	Indictment filed. (Returned at the Houston Division)
3/ 1/66	Deft. Timothy Leary's motion for bill of particulars filed duplicate (MD 3/7/66).
3/ 1/66	Government's answer to motion of deft. Timothy Leary for bill of particulars filed duplicate.
3/ 3/66	Deft. Timothy Leary's motion for bill of particulars filed duplicate.
3/ 7/66	(BCC) Order denying all pending motions entered.
3/ 9/66	Motion of deft. Timothy Leary to quash contents in the indictment filed duplicate.
3/ 9/66	Motion of deft. Timothy Leary to dismiss the indictment filed duplicate.
3/ 9/66	(BCC) Order first day's hearing entered (evidence begun before the court as to deft. Susan Leary and before the court and jury as to deft. Timothy Leary. Govt. rested).
3/ 9/66	(BCC) Order denying oral motion of deft. Timothy Leary for judgment of acquittal entered.
3/10/66	(BCC) Order 2nd day's hearing entered. (Defendants' evidence resumed; and concluded, except for expert witnesses.)
3/10/66	Requested instructions to the jury of deft. Timothy Leary filed.
3/11/66	Requested instructions as to the jury of deft. Timothy Leary filed.

Appendix F

3/11/66 (BCC) Order 3rd and last day's hearing entered. (Oral motion of deft. Timothy Leary for judgment of acquittal made. Deft. Susan Leary adopted the same motion. Argument of counsel. Charge of the court.)

3/11/66 (BCC) Order dismissing ct. 1 as to deft. Timothy Leary on the court's own motion entered. Cts. 2 and 3 only submitted to the jury.

3/11/66 Jury verdict received and filed. (Deft. Timothy Leary found guilty as charged on cts. 2 and 3.)

3/11/66 (BCC) Sentence as to deft. Timothy Leary: Committed under section 4208(B) T-18, USCA for examination, etc. on ct. 2: 20 years to serve and fine of $20,000.00. to be paid. (Deft. to remain on the same bond pending notification where to report.)

3/16/66 Deft. Timothy Leary's motion for a new trial filed duplicate.

3/18/66 (BCC) Order that deft. Timothy Leary surrender himself to U.S. Marshal filed and entered.

3/18/66 (BCC) Order overruling motion for a new trial, deft. Timothy Leary, filed and entered.

3/18/66 (BCC) Judgment and commitment, deft. Timothy Leary, filed and entered.

3/18/66 Notice of appeal, deft. Timothy Leary, filed duplicate.

3/22/66 Copies of notices of appeal and statement of docket entries mailed to Clerk, U.S. Court of Appeals, New Orleans, La.

3/22/66 Copies of notices of appeal mailed to U.S. Atty., Houston.

3/25/66 Appearance bond on appeal, deft. Timothy Leary, in sum of $5,000.00 (cash) filed duplicate.

4/21/66 (BCC) Certified copy of order extending time for filing record on appeal to 90 days from 3/18/66 filed and entered.

4/21/66 Original order extending time for filing record on appeal to 90 days from 3/18/66 mailed to Clerk, U.S. Court of Appeals, New Orleans, La.

Appendix F

INDICTMENT

THE GRAND JURY CHARGES:

Count One

That on or about December 22, 1965, in the Laredo Division of the Southern District of Texas, and within the jurisdiction of this Court, one TIMOTHY LEARY and one SUSAN LEARY did unlawfully, knowingly, and wilfully, with intent to defraud the United States, smuggle and clandestinely introduce into the United States, a quantity of Marihuana which should have been invoiced, to-wit: approximately three (3) ounces of Marihuana (Cannabis Sativa) without having such Marihuana invoiced, contrary to and in violation of Section 176(a), Title 21, United States Code.

Count Two

That on or about December 22, 1965, in the Laredo Division of the Southern District of Texas, and within the jurisdiction of this Court, one TIMOTHY LEARY and one SUSAN LEARY, hereinafter called defendants, with intent to defraud the United States, did unlawfully and knowingly transport and facilitate the transportation and concealment of three (3) ounces of Marihuana (Cannabis Sativa), more or less, after importation, and the defendants then and there knew the said Marihuana to have been imported into the United States contrary to law, in violation of Section 176(a), Title 21, United States Code.

Count Three

That on or about December 22, 1965, in the Laredo Division of the Southern District of Texas, and within the jurisdiction of this Court, one TIMOTHY LEARY and one SUSAN LEARY, transferees, required to pay the transfer tax

imposed by the Internal Revenue Code, did unlawfully and knowingly transport, conceal and facilitate the transportation and concealment of a quantity of Marihuana, to-wit: approximately three (3) ounces of Marihuana (Cannabis Sativa) without having paid the transfer tax imposed by said code, in violation of Section 4744(a)(2), Title 26, United States Code.

A TRUE BILL:

C. MAYLOR
Foreman of the Grand Jury

WOODROW SEALS
United States Attorney

By RONALD J. BLASK
Assistant United States Attorney

RJB:lh

TESTIMONY

A. *Testimony of Customs Inspector Herbert O. Best.*

[70] *Direct examination by Mr. Blask:*

Q. What is your name, please? A. Herbert O. Best.

Q. Mr. Best, where do you live? A. Here in Laredo, Texas.

Q. And how are you employed? A. As a U.S. Custom Inspector, Port of Laredo.

Q. How long have you been a customs inspector here in Laredo? A. Since 1962.

Q. Were you so employed and on duty in the capacity of a customs inspector on or about December 22, 1965? A. Yes, sir.

Q. Do you recall your duty hours at that time? A. I worked from 2:00 in the afternoon until 10:00 P.M.

Q. Directing your attention to the 22nd of December of 1965 and to approximately 6:30 in the evening, did you have an occasion to see the defendant, Timothy Leary? A. Yes, sir.

Q. Approximately what time of day or night was it that you saw him? [71] A. At approximately 6:45 P.M. he arrived.

Q. Now, for the purposes of the record do you see—do you see Timothy Leary in the courtroom? A. Yes, sir.

Q. Would you point him out for the jury, please? A. Dr. Leary is sitting right here facing me on my right.

Q. What brought him to your attention on that occasion, Mr. Best? A. He arrived in the secondary inspection area at Laredo—

The Court: Was he coming back from Mexico?

The Witness: Yes, sir.

The Court: All right.

A. Testimony of Customs Inspector Herbert O. Best

A. (Continuing) He arrived at the secondary inspection area at the port of Laredo, Texas, driving a vehicle.

By Mr. Blask:

Q. Where was your station that evening? A. I was assigned to baggage inspection.

Q. Is that the secondary area? A. That is in the secondary area.

Q. Had he been directed to your area by the primary station? A. He had been—the vehicle had stopped at the primary inspection station and the customs secondary ticket placed on the vehicle.

Q. Was the vehicle coming from Mexico into the United States? Yes, sir.

Q. At the time that the vehicle approached you, what did you [72] do? A. I directed him into a parking space and asked the driver to place all their baggage and merchandise on the inspection table.

Q. Who was the driver of that car? A. Timothy Leary.

Q. Do you recall—can you give us a description of the automobile? A. It was a blue Ford station wagon bearing a Connecticut license, and I believe it was a 1966 model.

Q. At the time that you asked them to unload the luggage what was said, if anything, by the driver? A. The driver?

Q. And that was Timothy Leary? A. Yes, sir.

Q. All right. What did he say to you? A. He wished to advise me, or request if it were possible not to unload all of the baggage. He explained that he had not been into the—into Mexico; they had crossed the bridge to the Mexican official station over there and had not obtained their tourist permits and car permits and that they had been advised to return at 8:00 o'clock the following morning.

A. Testimony of Customs Inspector Herbert O. Best

Q. What, if anything. did you say to them at that time? A. Well, I asked if they had anything from Mexico.

[73] Q. What— A. . . . and they said they did not.

Q. Did he answer you? A. They said they had none—nothing.

Q. Did Timothy Leary answer you, specifically? A. Yes, sir. I was questioning the driver of the vehicle.

Q. All right. He said he had nothing from Mexico? A. That's correct.

Q. O.K. did you ask him anything else? A. I asked him about how long he had been over there and he said within the hour they had crossed.

Q. Did you ask him anything else? A. Well, I asked to see the baggage. He said I could look at anything I wished. So I observed the persons in the car and then asked them to step out of the vehicle.

Q. Was there anything about the appearance of the individuals in the automobile that made you suspicious? A. Well, there was considerable baggage in the car. One occupant of the vehicle was sitting behind the second seat among the baggage.

Q. Was that a male or female? A. Male.

Q. Was there anything about his appearance that particularly attracted your attention to him? [74] A. Well, he was bearded, a rather long-haired person and possibly a beatnik appearing, and so I asked them all to step out so that I could check the vehicle and observe their persons.

Q. How many individuals were in the car at that time? A. There were five passengers.

Q. And how many males? A. Three males and two females—occupants.

Q. After they got out of the car, what, if anything, did you do at that time? A. Well, I began looking through the vehicle—the interior of the vehicle and at their baggage inside the car.

A. Testimony of Customs Inspector Herbert O. Best

Q. All right. The baggage was in the automobile at that time? A. Everything was in it. Just the people had stepped out.

Q. O.K. A. I started looking through it and I noticed some vegetable material and a seed on the floor of the car right behind the front seat.

Q. Were you able to identify that seed that you saw? A. Yes. It appeared to be—

Q. What— A. I thought it was a marihuana seed—excuse me—marihuana seed.

Q. When you found that seed what, if anything did you do [75] at that time? A. I requested permission from Supervisor Inspector Sanders to give the occupants and the car a complete search.

Q. Was that permission received? A. Yes, it was.

Q. And based upon that permission what did you then do? A. I asked the occupants to unload everything from the vehicle.

Q. And was that done? A. Yes, sir.

Q. Then what occurred? A. I again asked them if they had anything from Mexico.

Q. Did you direct it to all of the individuals or did you direct it to Timothy Leary? A. To all of them. They were outside the vehicle at that time.

Q. And what was their answer in response to their question? A. No one would declare anything from Mexico.

Q. Then what occurred? A. I asked them to come into the baggage room and asked them to have seats on the benches there.

Q. Did you escort all five of the people? A. Yes, sir.

Q. Did you see Susan Leary in the automobile? [76] A. Yes, sir.

Q. Do you see Susan Leary in the courtroom today? A. Yes, sir.

Q. Would you point her out for the purposes of the record and the jury? A. She is sitting on my left next to Timothy Leary.

Q. Behind her father? A. Yes, sir.

Q. All right. After you escorted them into the baggage room, what did you then do? A. Supervisor Sanders stayed with the occupants while I took the men, one by one, into the search room and performed a personal search on them.

Q. Is the search room on the premises at the footbridge? A. Yes, sir.

Q. Did you conduct a personal search and interview with Timothy Leary? A. Yes, sir.

Q. Did you direct a series of questions to him at the time you took him into the room? A. Yes.

Q. What did you ask him? A. First, his name.

Q. What did he say to you? A. Timothy Leary.

[77] Q. What else did you ask him? A. I asked him where he lived.

Q. What did he say in response to that? A. Millbrook, New York.

Q. Did you ask him anything further? A. I asked what his occupation was.

Q. What did he tell you to that? A. Psychologist. And I—

Q. Did you ask him anything further? A. I asked him by whom he was employed and he said that he was the director of the Castalia Foundation.

I asked the nature of it. He said, "It's a research foundation."

Q. Did you ask him anything else? A. I asked him where he was born, his date of birth.

Q. Did he give you answers to those questions? A. Yes, he did.

Q. Then what occurred? A. I asked him to empty his pockets on the table and he did that.

A. Testimony of Customs Inspector Herbert O. Best

Then I had him remove his clothing to see if he had anything on his person.

Q. Did you find any contraband on his person? A. None.

Q. Did you find any contraband in his clothes? [78] A. None.

Q. Did you ask him any other questions? A. Yes. I asked him if he had any record of arrest or any criminal record.

Q. What was his response to that? A. "None."

Q. Did you ask him anything else? A. I asked him had he ever used any narcotics or marihuana.

Q. And what was his response to those questions? A. He told me he had not.

Q. Did you ask him anything else? A. I asked him what his marital status was and he told me he was married.

Q. Did that conclude your personal search and your interview of him at that time? A. Yes, sir.

Q. Who was the next person that you did interview? Do you recall? A. I believe John Leary was the second, which I performed a personal search on.

Q. Did you understand that he was the son—

Mr. Fitzgibbon: Now, if your honor please—

The Court: You may ask the question, Mr. Blask. Don't answer it please so counsel can [79] object.

By Mr. Blask:

Q. Did you interview and search John Leary? A. Yes.

The Court: Is there objection?

Mr. Fitzgibbon: Yes, if your honor please. John Leary is not on trial and the only reason that that question is being asked is to prejudice the jury, to

show that John Leary was a defendant. It's a matter of—

The Court: I would overrule the objection that the only purpose of the question was to prejudice the jury. If that is the only objection, you may answer.

Mr. Fitzgibbon: The other objection, if your honor please, is that John Leary is not on trial and it's irrelevant and immaterial.

The Court: I will overrule the objection that's it's irrelevant and immaterial. I don't know what the answer may be.

By Mr. Blask:

Q. Did you find any contraband on John Leary? A. No.

Q. How old a person would you say that that person was when [80] you first saw him and talked to him? A. Approximately 16.

Q. The other male person, did you also conduct a personal search and interview that individual? A. Yes, sir.

Q. Did you find any contraband on him? A. No.

Q. What was done with the defendant, Susan Leary? A. When I completed the personal search of the male occupants of the vehicle, I asked custom inspectress Helen Loftis to perform a personal search on the female occupants.

Q. And while that was being performed, what, if anything, did you do? A. I left supervisor inspector Sanders in the baggage room with the other occupants and I took Timothy Leary out to the vehicle and began an inspection of the vehicle.

Q. When you arrived out at the car what was the first thing that you began doing? A. Well, I asked Dr.—or,

Timothy Leary, to stand near the vehicle and I began checking further in the interior of the vehicle.

Q. Where did you look in the car? A. In the glove compartment and on the floor of the seats, initially.

[81] Q. All right. Did you find anything of an unusual nature in the glove compartment of the automobile? A. Yes. I found additional sweepings and marihuana seeds loose in the glove compartment.

Q. What did you do with what you found? A. I placed these into an envelope.

Q. Did you mark them for future identification? A. Yes, I did.

Q. Where was Timothy Leary at that time? A. He was sitting on the inspection table next to the vehicle.

Q. At the time that you found the sweepings did you ask him any questions or did he ask you anything? A. He asked me what I was doing.

Q. And what did you tell him? A. I told him that I found what I believed to be marihuana in the vehicle.

Q. Did he answer you at that time? A. He said, "Well, I know nothing about that."

And he started to—he opened the door of the car and started to take something out.

Q. Did you— A. I asked him what he was getting. He said, "I want to get a book."

Q. And did he remove a book from the automobile at that time? [82] A. Yes, he did.

Q. And what did he do then? A. He sat around and proceeded to read, and I continued the inspection of the vehicle.

Q. Was he in close proximity to the automobile while you were conducting your search at that time? A. Yes.

Q. Did you find anything else in the automobile of an unusual nature? A. I found some additional sweepings and seeds in it.

A. Testimony of Customs Inspector Herbert O. Best

Q. Marihuana seeds? A. Yes.
Q. Where did you find those? A. On the floor boards.
Q. Front or rear? A. Both.

* * *

[83] Q. What occurred next, if anything, Mr. Best? A. While I was inspecting the vehicle Miss Loftis came out to the car and showed me a silver metal box and some material—containing material which I believed to be marihuana.

Q. All right. Would you describe this little container or box that she brought out to you? A. It was approximately three inches long, rather egg-shaped or oval-shaped, and maybe two inches in depth.

Q. Did it appear to be bronze or silver or what? A. It was silver colored.

Q. All right. Did you look inside of it? A. Yes.

[84] Q. What did you see? A. A quantity of material that I believed to be marihuana. There were three partially smoked cigarettes that appeared to be marihuana cigarettes.

Q. Did you see anything else? A. . . . and four—I believe four pills or capsules.

Q. Was Timothy Leary still seated in close proximity to you at this time? A. He was by the car on the table.

Q. What did you do at this time when Miss Loftis brought this container out to you? A. She advised me she had found these on the person—

Mr. Fansler, Jr.: If your honor please. I am going to object to what she advised him. That would be hearsay.

The Court: That would be hearsay. Sustained.

A. Testimony of Customs Inspector Herbert O. Best

By Mr. Blask:

Q. Mr. Best, not what she told you, what did you do after you saw and observed that container? What did you do? A. I asked Dr. Leary to come back into the baggage room.

Q. And once you got him back in the baggage room what occurred then? A. In the presence of Mr. Sanders and Miss Loftis I advised the occupants that they were under arrest and of their [85] rights: They did not have to make any further statements; if they did, that it could be used against them.

Q. Did you direct any further questions to them at this time? A. None specifically.

Q. Who did you place under arrest? A. All of the occupants.

Q. Well, did you place Timothy Leary under arrest? A. They were all seated together on the benches.

Q. He was one of the five individuals, wasn't he, Mr. Best? A. Yes, he was.

Q. He was one of the ones you placed under arrest, wasn't he? A. That is correct.

Q. And was Susan Leary one of the individuals you placed under arrest? A. Yes, sir.

Q. The other lady occupant of the car, was she placed under arrest? A. Yes.

Q. And John Leary was placed under arrest, wasn't he? A. Yes.

Q. And the other individual you described as the Beatnik, was he placed under arrest? A. Yes.

B. Testimony of Customs Inspectress Helen M. Loftis

B. Testimony of Customs Inspectress Helen M. Loftis

[106] *Direct examination by Mr. Blask:*

Q. What is your name? A. Helen M. Loftis.

Q. Miss Loftis, where do you live? A. I lived in Laredo, Texas.

Q. And how are you employed? A. I am a U.S. Customs Inspectress at the Port of Laredo, Texas.

Q. How long have you been a customs inspectress? A. Nine years.

Q. Were you so employed and on duty on the evening of December 22 of 1965? A. I was.

Q. Do you recall your duty hours? A. I worked from 4:00 P.M., in the afternoon, until midnight.

Q. Directing your attention to that particular day and to around 7:00 o'clock in the evening, was your attention directed to an individual by the name of Susan Leary? A. Yes, it was.

Q. Now, for the purposes of identification, do you see that [107] individual in the courtroom today? A. Yes. The young lady sitting here with the tan sweater.

Q. Approximately what time of evening was it that you were first attracted to her or she was brought to you? A. Around 7:15 or 7:20.

Q. Were you requested to conduct a personal search of her? A. I was.

Q. And did you do so? A. I did.

Q. Where was that conducted, Miss Loftis? A. In the room which has been set aside as a personal search room at the Port of Laredo, Texas.

Q. Do you recall, or can you tell us how she was dressed at that time? A. Well, she had on a rather loose dress.

Q. All right. At the time that you took her into the search room did you direct a series of questions to her? A. Yes, I did.

B. Testimony of Customs Inspectress Helen M. Loftis

Q. And would you tell us what those questions were? A. I asked her her name and she said her name was Susan Leary, that she was a student at the Barlowe School in Amenia, New York.

Q. Did you ask her anything else? A. Yes. I asked her who was accompanying her at the time and she told me that her father, Timothy Leary, her [108] brother, John, and a friend, Miss Woodruff, and a man by the name of Rene; but she did not know his last name.

Q. She didn't know the name of this last person? A. No.

Q. . . . or the last name of this individual? A. That's right.

Q. What else did you ask her? A. Well, I asked her if she had a criminal record and she stated she did not.

I asked her if she had ever smoked any marihuana and she said, "No." . . . and if she had ever used narcotics and she said, "No."

Q. Did you ask her anything further at that time? A. I asked her before—I asked her to remove her clothing so that I could give a personal search to see if she had—

Q. Did you ask her if she had brought anything back from Mexico? A. I asked her if she had anything on her person—anything that she had acquired in Mexico, or if she was concealing anything on her person, and she said, "No."

Q. At that time did you ask her to disrobe? A. Yes, I did.

Q. What did her clothing consist of? [109] A. She had a dress and a pair of panty briefs.

Q. And that's all. A. That's all.

Q. What happened after she disrobed, Miss Loftis? A. After she removed her dress I asked her to lower her panties and to turn around and stoop over for inspection, and at that time I saw a silver object concealed between her legs.

C. Testimony of Customs Agent Rey L. Hatch

Q. Now, was that in her panties or was it physically between her legs? A. It was physically between her legs.

Q. When you saw that item what, if anything, did you do at that time? A. I asked her what it was and to hand it to me.

Q. Did she do that? A. Yes, she did.

Q. What did—what was her answer to your question of "What was it?" A. She gave me no answer.

Q. After you took possession of it, would you describe it to us? A. It was a silver box, sort of oval-shaped. It was approximately two and a half to three inches long.

Q. Was it metal? A. It was about two inches wide. [110] Yes. Silvery metal.

Q. Did you open this little box? A. Yes, I did.

Q. And would you describe to the jury what you found inside? A. I found a green substance which appeared to be marihuana.

Q. All right. A. . . . and three partially smoked cigarettes and four capsules.

C: *Testimony of Customs Agent Rey L. Hatch*

[136] Q. What else—what did you ask him? A. I then asked him— on the bottom there was a notation that he had never—never used marihuana.

Q. I see. A. . . . and no criminal record.

I again reviewed these with him and at this time I asked him who belonged to the silver—well, this little silver box. I believe I was the first one to call it a snuffbox.

And he said it was his, that he had given it to his daughter on the way back across the bridge and had told her to get rid of it.

C. Testimony of Customs Agent Rey L. Hatch

Q. Did you ask him anything further? A. I told him to wait a minute and I called in customs port investigator Eugene Smith and asked him again about this.

Q. And what did he answer that time—the second time? A. He just told us that he had given it to Susan and had told her to get rid of it.

Q. And did you ask him anything further? A. At that time, yes, sir, I did. At that time I asked him if he had the form from the Treasury Department to transfer marihuana or to have marihuana in his possession.

Q. And did he produce one at your request? [137] A. No, sir. He did not.

Q. Did you at a later time make the same request of Susan Leary? A. Yes, sir. I did.

Q. And did she respond with such an order form? A. She made no comments at all.

Q. Did Mr. Leary say anything else to you in response to any questions that you might have propounded to him after he told you that he had given it to his daughter to get rid of? A. Yes, sir. He told customs port investigator Smith and I that he knew more about narcotics and marihuana than either one of us.

Q. I see. And did you ask him anything else? A. There was a general group of questions, whether he had leased this car or whose car it was, and just general information that we received.

Q. Did you direct any further questions to him regarding the marihuana or the contraband that you found or that was found? A. Yes, sir. He told me that he had—in the questioning he told me that he had just gone to the border area, or to the Mexican side; that he had been refused entry into Mexico and that he was told to return the next morning at 8:00 o'clock, and he didn't know why we were making [138] so much fuss about it.

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C. Testimony of Customs Agent Rey L. Hatch

[153] Q. Now, you testified this morning that the defendant said that he—anyway, the little silver snuffbox and its contents was his? A. Yes, sir.

[154] Q. . . . and that he had given it to his daughter and told her to get rid of it? A. Yes, sir.

Q. Was that substantially your testimony? A. Yes, sir. These are, I believe, his exact words: He said it was his and he handed it to her and told her to get rid of it.

Q. And when I paraphrased you that was substantially what you said this morning, was it not? A. Yes, sir.

Q. Now, Rey, did he tell you that he had been to Mexico and that they attempted to get into Mexico that evening and they were refused entry and they had to come back? A. Yes, sir. He did.

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[155] Q. Now, then, did he tell you then at that time that he knew that there was Marihuana in the automobile when it was in Mexico and that he had asked the four of the other occupants, or directed them to get rid of any marihuana that was in the automobile? A. No. He—

Q. He didn't tell you this? A. No, sir.

Q. Well, did he tell you that that marihuana was not acquired in Mexico but that it had been exported from the United States and brought into Mexico?

He did tell you that, didn't he?

A. Yes, sir. He didn't know why he was being charged with smuggling, because he said he had it with him.

Q. He said he had it with him and he—

The Court: Had it with him before he went into Mexico?

The Witness: . . . before he went into Mexico. Yes, sir.

C. Testimony of Customs Agent Rey L. Hatch

By Mr. Fitzgibbon:

Q. And did you make a note of that statement any place? I notice it's not here on your— A. Well, no, sir. Not that he had it. This was—I don't know whether he told me this directly or he had implied it that he had the marihuana in the United States.

There is a notation on the back of my search sheet of [156] Dr. Leary.

Q. There is a notation? . . . where on this? A. Yes, sir. Not on— The notation is to his being warned. Also as to—

Q. Well, the question I asked you was: Did you make any notes that the defendant had stated that he had brought marihuana from the United States into Mexico? A. No, sir. I did not.

Q. I see. Did— When he told you that did you ask him anything as to where it had come from or did you ask him— A. I believe I asked him—

Q. Did you pursue the question any farther? A. I believe I asked him where it came from, but he would not say where exactly it came from.

Q. Therefore, he was insisting that it wasn't smuggled? Is that right? A. Yes, sir. He was very insistent.

Q. You stated a moment ago that he did not tell you that while the car was in Mexico that he had told his traveling companions to get rid of the marihuana? Didn't he tell you that he did? A. He said—I believe he stated—or, he stated that he gave it to Susan and told her to get rid of it while they were on the bridge coming back into the United States.

Q. Now, you say that you believe that he said that?

[157] A. Yes, Sir. I believe so.

Q. Could it have been—this is very important—could it have been that he had intimated that; you had received that impression, or that you obtained that impression from

his conversation, but that he—that what he might have meant was that he actually told Susan to "get rid of the marihuana that was in the car before we come back to the United States"?

Mr. Blask: Your Honor, I am going to object to what might have been in the mind of the defendant.

The Court: I would sustain it. You may ask the witness what the defendant said to him, but asking him to speculate as to what he might have meant or something like that is not proper.

By Mr. Fitzgibbon:

Q. Would it be that the defendant could have told you, then, that he could have told Susan or someone else to get rid of the marihuana? A. Yes, Sir.

Q. All right. Now, did he tell you about what place on the bridge they were?

Well, let me rephrase that. Did you ask him if he knew that Susan, his daughter, had the marihuana concealed? [158] A. Yes, sir.

Q. And what did he say? A. He says—I believe he told me just that as they were coming onto the American side that Susan told him that she still had it.

Q. Just as they were coming up to the American customs? A. Yes, sir.

Q. All right. Now, I am going to show you a drawing that is large and cumbersome. Now, this—I am not going to say this is drawn to scale, although I believe it has been. But I do not have the man here that made it. A. Yes, sir.

Q. Now, I will just ask you: I will point out that this is going in the general direction of south and this is north and the States here, and this would be west and this would be east (indicating).

And here is the outbound traffic and here is the international bridge and the international boundary going over here.

C. Testimony of Custom Agent Rey L. Hatch

And I believe, if you remember, if you are going to go into Mexico you, instead of going underneath the customs house over there, the tourists would turn off to the right, would they not? A. Sometimes. If they know where to turn off. Sometimes they go up and ask the Mexican officials and then go [159] around behind.

Q. Anyway, back here is where— A. No, sir. They end up down over to the right.

I might point out that they end up in the parking area that is over here on this side—well, right up in here and here (indicating).

Q. All through here and here (indicating)? A. Yes, sir. And over in this area here (indicating).

Q. Now, I believe he told you that the car had been over there? A. Yes, sir.

Q. . . . And—sorry. And then he told—did he tell you, then, that after they were turned back—I believe you testified that they started back across the river here (indicating)? A. Yes, sir.

Q. And, of course, they were apprehended over here (indicating)? This is customs? A. Yes, sir.

Q. Now, what I am trying to find out—and if you would designate it, if you know—he stated that he knew Susan had the marihuana, but at what point did he discover that that she had the marihuana? Did he tell you that? A. No, sir.

Q. He didn't? [160] A. No, sir. I believe that just—if I remember right, he said as they were coming up to customs. I don't know whether he meant coming up here (indicating) or where they pulled in, or where. Just as they were coming up to customs.

Q. He told you, though, that he at that point—I want to get the facts. At that point, that he did know that she had the marihuana concealed? A. Yes, sir.

D. Testimony of Chemist Fred V. Eggerton

Q. Did he also tell you, Rey, that when they started out from Mexico that he did not know that she had the marihuana concealed? A. I don't know at what point he gave it to her, sir.

Q. But he did tell you that some place, as best your memory is—and I know—I know you will tell us, and I know you are a truthful man—that some place along the line, just probably before he reached the customs station, that he discovered that she had—that Tim Leary discovered that she was carrying the marihuana? A. Yes, sir. I believe that she told him that she still had it.

Q. Wait a minute. What was that last statement that you made? A. That she told her father that she still had it?

Q. She told her father she still had it? [161] A. ... she still had it.

Q. She told her father that she still had it, or she had it? A. She told her father that she had it. Yes, Sir.

* * *

D. Testimony of Chemist Fred V. Eggerton

[176] Q. All right, sir. Would you state to the court and jury the chemical contents of the white envelope marked number 1, based on your examination. A. The white envelope marked number 1 contained a metal box which contained marihuana.

Q. Was it crude marihuana or was it semi-refined marihuana, or what type of marihuana was it? A. It was in the form of semi-refined marihuana.

Q. All right. Now, was that all that was contained in the silver box was semi-refined marihuana? A. No, sir. There was three partially smoked cigarettes in a paper package in the metal box, and the cigarettes also contained marihuana. And there was also a paper package in this metal box of four capsules.

D. Testimony of Chemist Fred V. Eggerton

Q. And what did the capsules contain? A. The capsules contained detroamphetamine sulfate, which is a central nervous system stimulant, not a prohibitive narcotic.

Q. Each cigarette—is it your testimony that each cigarette contained marihuana? A. Yes, sir.

Q. And then there was semi-refined marihuana, loose, or how? A. Loose in the metal box.

[177] Q. All right, sir. Now, let's take these. That was number 1? Is that correct? A. That's correct.

Q. All right. Now, let's take envelope number 2. Tell the court and jury what envelope number 2 contained and what the analysis was. A. Envelope number 2, which had written upon it "sweepings from glove compartment and floor of automobile" also contained marihuana.

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[179] Q. Do you have the weight of the marihuana that was found to be positive—the positive weight? did you weigh the marihuana— A. The marihuana.

Q. . . . The sample? A. The marihuana in the metal box weighed about 11 grams.

Q. About what? A. Eleven grams.

Q. All right. Did you—do you have the weight of the other samples? A. I don't remember specifically. I think the sweepings from the floor mat was five grams, as well as I remember.

Q. A small amount? Is that correct? A. That's right.

[180] Mr. Susman: Pass the witness.

Cross examination by Mr. Fitzgibbon:

Q. You say in the envelope there were—I mean, in the metal box, you recall there were 11 grams? A. Loose in the metal box was a little over 11 grams.

Q. Well, is that counting everything in the lot? A. Pardon?

Q. I think you stated in the box was contained semi-refined marihuana plus three partially smoked cigarettes, which contained marihuana, and four capsules. Now, excluding the capsules in the box—you are not talking about weighing the capsules, are you? A. No, sir.

Q. Excluding the capsules do you know how much loose marihuana there was in the little box? A. A little over 11 grams.

Q. Plus the cigarettes? A. Yes, sir.

Q. And did you weigh the cigarettes? A. I don't remember specifically whether I weighed the cigarettes or not. In some instances of this nature, where the amount is relatively small, an estimation is made, and as well as I recall, the three cigarettes together weighed [181] two grains.

Q. Well, then, to the best of your recollection there was 11 grams and two *grams* on the little box? A. Eleven grams. There was a little over 11 grams. I think it was 11.11 grams of loose marihuana in the box, plus about fifteen-hundredths of a gram of marihuana in the cigarettes.

Q. Oh. Fifteen-hundredths of a gram? . . . Fifteen-hundredths? And that would be zero point fifteen-hundredths? Zero point fifteen? A. In the cigarettes.

Q. In the cigarettes? A. They were partly smoked cigarettes.

Q. Now, that is fifteen-hundredths of a gram. I have forgotten, sir. Could you tell us how many grams in an ounce? A. There are 28.35 grams in an ounce.

Q. And how many grains in a gram? A. There is 15.43 grains in one gram.

Q. . . . Grains in a gram? And to find out how many grains in an ounce you would multiply 15.3 times 28.35? A. Uh huh. Yes, sir.

E. Testimony of Petitioner Timothy F. Leary

Q. Now, since there was 11—all right. We have in the little box, then there was 11 plus— [182] I am a little bit confused now. You said there were 11.11 grams and then fifteen-hundredths of a gram? That would be just about something less than 12 grams in the metal box? A. Approximately 11 and a quarter grams altogether.

Q. Eleven and a quarter grams in the little box? I see. Now, going then into envelope number 1—No, going into envelope number 2. Number 1 was the metal box, wasn't it? A. That's right.

Q. Going into envelope number 2, "sweepings from the glove compartment contained marihuana." Can you hold that number 2? A. (Complying.)

Q. How much, in grams, would that be, or grains or— A. As well as I remember it was also an approximation, and it was about 15 grains.

Q. Fifteen grains? A. Right.

Q. I see.

The Court: Now, this is the sweepings from the the glove compartment that you—.

The Witness: This is the sweepings from the glove compartment and the floor of the automobile.

E. Testimony of Petitioner Timothy F. Leary

[313] Q. All right. Now—all right, sir. When you started out from Millbrook, New York, on this trip, did you subsequently go through Laredo? A. Yes, sir.

Q. All right. When you started out, then did you or did you not have a quantity of marihuana? A. Yes, sir.

Q. Where did you obtain the marihuana? A. That was given to me by a friend.

[328] A. Well, I knew—I knew where the bridge was, but I didn't know what the traffic situation was, and so forth.

So then we—as we came across the bridge I saw in front of me this stand with the Customs sheds and so forth.

Q. You are talking about the American side? A. Yes, sir.

Q. I see. A. And that—then I thought, "will we have to go through Customs on the American side?" That is the first time that this occurred to me, because I was mainly concerned with Mexico.

So at that point I said, "Is all of the marihuana out of the car?"

And at that point my daughter, Susan, said, "No," that the marihuana had just been found and that she had it.

Q. All right. Can you tell us on looking at this sketch about where you were on the bridge—the position that your automobile was on the bridge or the position of your automobile at the time that Susan Leary, your daughter, told you she had the marihuana? A. I can't say exactly. It would be where I would make the decision as to where—

Q. Now, look. Here's the international boundary line, the [329] middle of the river (indicating), and here is the Customs—U.S. Customs house. A person normally drives up here (indicating), turns to their right and drives through here and stops (indicating).

The Court: Suppose you let the witness tell us a little bit about what he did, counsel. You have been pointing and leading with your interrogation all the time. Let him tell us what happened, instead of you telling us.

A. Well, as I say, I didn't realize we were going to have to go through Customs. So it was at the time when I saw a sign or an arrow.

E. Testimony of Petitioner Timothy F. Leary

We went across freely and proceeded to go back the same way. So that would be at the time where I saw you had to turn right that I realized that we were—even though we hadn't been in Mexico we were probably going to have to be routed through Customs. Somewhere—

The Court: You may step down and show us if you wish.

A. (continued) And this is an estimate, because I wasn't thinking of the exact place. Say we were somewhere here (indicating), where you would see the sign that said "Traffic Go Right."

By Mr. Fitzgibbon:

Q. All right. Well, make an "X" mark [330] wherever— A. Well, this is an estimate, but I would say there (indicating).

Q. Dr. Leary, would you—you have placed a mark on the diagram. Now, is that mark the place just about at the end of the bridge, as you recall, or just where you turn right to the Customs? A. I don't know where the bridge ends, but it would be where you—would be about where you would turn right to go into the Customs house.

Q. Let the record show, then, that the witness made an "X" on the diagram, which is perhaps three-quarters of the way from the boundary of the United States to the United States Customs inspection station. When you discovered that your daughter had this marihuana did you ask—what did you do, if anything? What did you do then? What action did you take, if any? A. I didn't take any action. I was driving the car and I turned into the Customs shed.

E. Testimony of Petitioner Timothy F. Leary

Q. Did you—what happened then when you were driving into the Customs shed? A. Some—we parked here (indicating) and the man said that we should drive the car and go up to the—up, probably to the parking stall for baggage inspection.

[331] Q. You heard the witness—the government witness that testified yesterday morning. He sent you to the secondary inspection? A. Yes, sir.

Q. Now, what happened, then, at the secondary inspection? Did you—did you say, "my daughter has marihuana"? A. No, sir. I didn't. When the man—the inspector—I believe his name is Inspector Best—came up to the car, I had in my hand the four visas—four passports with the visa applications, and I explained to him that we had not been in Mexico and I was assuming that we would just drive on.

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[343] *By Mr. Fitzgibbon:*

Q. All right. Now, you know there is a provision—just answer this yes or no.

You know there is a provision to pay— Do you know there is a provision to pay the transfer tax in the law—under the law? A. I know that there is such a provision. Yes, sir.

Q. Now, why didn't you pay the transfer tax in this instance on the marihuana that you had? A. Well, I knew that I couldn't get such a permission. Even in the case of plants like peyote or LSD—I am not allowed to have them because I don't do research in a laboratory and because I use them for religious purposes, and there is no provision in the law for doing it.

I also know that if I had applied for such a stamp I would probably subject myself to investigation and—

Q. You knew you could—

E. Testimony of Petitioner Timothy F. Leary

Mr. Susman: We object to counsel telling what the answer is, your honor.

The Court: I think it's well taken.

By Mr. Fitzgibbon:

Q. Do you know the tax on marihuana—this special tax on marihuana? Do you know the amount? A. It's my understanding that for $1 or $3 you can buy some sort of a permit.

[344] Q. As to the special tax, how much— A. . . . and then if you—if you have marihuana and don't have a permit it's $100 an ounce.

Q. Why didn't you pay that? When you first acquired this marihuana, then why didn't you pay that—make provisions to pay this $100 an ounce? You had a half ounce—$50. A. I was very certain that I would not be able to pay the tax on the marihuana and that not only would it be taken away from me but I would be subjected to action.

Q. Did you or did you not— A. It's well known that many people have tried to obtain marihuana for research and religious purposes and have not been able to get it.

Q. Did you or not entertain the belief that you did not have to pay this tax? A. I consider taxes on pursuit of knowledge or on religion to be a violation against religion. When a man has to pay a tax—or a tax to pay on his religion, I think it's time to say, "You have gone too far" to the agents who want you to pay taxes for these purposes.

Q. Have you written any articles to that effect? A. Yes, sir. I—there have been many articles—as I stated I don't recall—on the fifth freedom. That is the freedom of a man to pursue his inner goals and to [345] expand his own consciousness, and as long as there is no evidence that he is hurting society or other people—I call this

the fifth freedom—and I have written one article which is called "The politics of conscious expansion" in which we tried to explain why we believed that not only that it's the right but it's—we think that it's the goal that everyone should have.

Q. You think that it's a moral right? A. It's both a moral and a political right.

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By Mr. Fitzgibbon:

[347] Q. Now, you explained why you didn't pay the $100 an ounce—why you didn't pay the $1 or the $3 tax provision and register as a scientist.

Forgetting about religion, now, for a moment, why didn't you pay the proper tax that it's possible to pay to experiment with marihuana as a scientist? A. Well, I knew that I wouldn't be able to get the permit.

The Court: Did you make application to the proper authorities at any time?

The Witness: Not for marihuana. No, sir. I had for other chemicals, like mescaline, peyote and LSD.

By Mr. Fitzgibbon:

Q. Were you allowed—were you given a permit for it? A. No, sir.

Q. All right. Then why didn't you make one? Now, why didn't you make one for marihuana? A. Well, the regulations governing the other psychedelic drugs say that you have to research these in a mental hospital; you have to have an M.D. and it has to be done in—behind bars.

E. Testimony of Petitioner Timothy F. Leary

(348) Now, I am not an M.D., I don't have a mental hospital and I can't—obviously, I don't qualify.

Q. Now, there is a provision where people other than a doctor, is there not, can pay—other than an M.D.—

Mr. Susman: Well, we object, your Honor, if he is questioning him on the law. I think the court would rule on that.

The Court: I would sustain that. You need not interrogate this gentleman on what the statutes of the United States provide.

Mr. Fitzgibbon: I realize that, your Honor. I am trying to get from him why he didn't pay the statute—or, why he didn't pay the tax.

A. I knew it wouldn't do any good and I feel it's an invasion of my rights.

I don't ask the government to license me to pursue knowledge. Unless it is hurting somebody else—

I can't say it?

I can give you many other details, but those two reasons are exactly what I feel about it.

By Mr. Fitzgibbon:

Q. Did you or did you not have an honest belief that you could not obtain the permit? A. Yes, sir. I knew—

(349) Q. . . , for marihuana? A. Yes, sir. I had a strong and honest belief that I could not get it and it would just cause a lot of publicity and trouble for both the government and myself. And I am not trying to cause trouble, I am trying to pursue knowledge and in raising my children I am not trying to initiate testing.

E. Testimony of Petitioner Timothy F. Leary

Q. Dr. Leary, this marihuana that you acquired in New York, did you or did you not know that—did you know the source of that marihuana? A. No, sir. I didn't know where it was grown, do you mean?

Q. Yes. A. No, sir. I don't know.

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By Mr. Susman:

(352) Q. Let's go back to when you were turned back from Mexico by the Mexican officials.

At that point, according to your story, it occurred to you that there was marihuana which you would have to take back into the United States and you knew it was illegal? Is that correct? A. No. If you will let me go back again into exactly what happened.

When I first went into this room, Mr. Jorge Garcia said that I could go to Mexico and he wrote on a piece of paper the address of the Gubernacion Office.

The Court: No, Sir. The question that was asked you was this, as I understand it:

When you returned to the United States—

The Witness: Yes.

The Court: . . . You knew that bringing marihuana back would constitute a violation (353) of law?

Was that not it, Mr. Susman?

Mr. Susman: Essentially that. Yes, sir.

A. Well, I knew this at all times, that to bring marihuana into the United States was against the law.

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(357) *By Mr. Susman:*

Q. Would you tell us the name of the person that supplied you with the marihuana, now, please, Dr. Leary? A. During this recess—

E. Testimony of Petitioner Timothy F. Leary

The Court: Just tell us the man's name, if you will, please, sir.

The Witness: Yes.

A. Rosemary Woodruff.

By Mr. Susman:

Q. That was one of the ladies in the car with you? A. Yes.

Q. She supplied it originally in New York? A. Yes.

I phoned to New York during this recess and got her permission to tell you that.

Q. Now, you testified, I believe, that when you were coming back to the United States after being refused immigration visas in Mexico that you were right where the "X" is on that diagram when you found out there was still marihuana? Is that correct? A. Yes, sir.

(358) Q. Now, how, exactly, did it come to your attention that there was marihuana in the car at that moment? A. As I said earlier, Mr. Susman, I assumed that I could drive across—I didn't know the territory—or, I had never driven across that bridge.

When I got to the—when I saw the customs place coming up, it occurred to me that we might be examined by the customs there and I said, "Now, is all the marihuana out of the car?".

Q. Did you say that to everyone in the car generally? A. Yes. And then I moved to the back seat. I am not sure. I said, "Is all the marihuana out of the car?"

And at this point my daughter, Susan, said, "No."

Q. All right. What did you say in response to her statement? A. I don't remember saying anything—just about this time turning into the customs place.

Q. So you just kept going, then? Is that right? A. Well, I had to keep going. I was in the middle of the bridge, or I was on the bridge.

F. Testimony of Dr. Joe Fort

Q. Then, of course, no one in the car declared the marihuana when you got to customs? A. No, sir.

Q. Now, if you hadn't have been searched and the marihuana hadn't been found in the car and in Susan's clothing, (359) I assume you would have gone on into the United States with the marihuana, would you not? A. We were planning to stay the night in Laredo and go back to Nuevo Laredo the next morning.

Q. Well, Dr. Leary, then taking the circumstances as a whole, is it a fair statement to say that you would have introduced the marihuana into the United States without the knowledge of customs, except for the fact that you got caught? A. Yes, sir. That is true.

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(369) Q. Now, the marihuana that you acquired in New York from Miss Rosemary Woodruff—to clarify this point—you had no order form or transfer form for that marihuana? A. No, sir.

Q. Paid no tax on it? A. No, sir.

Q. And you had no order form or transfer form when you came back across the bridge from Mexico, then, with the marihuana? A. That's correct.

Q. You paid no tax and made no registration with the Treasury Department? A. That's correct.

F: Testimony of Dr. Joe Fort

(516) A. I could give, I think, a very informed and educated estimate, but I would certainly stress the word "estimate."

That is not the kind of thing that one can make an exact census of based on the amount of seizures which are usually estimated by experienced enforcement officials as representing about 10 percent of what actually comes into a country.

G: Trial Judge's Charge to Jury

(587) CHARGE OF THE COURT

The Court: Ladies and gentlemen of the jury. At this stage of our proceedings, after the parties have offered all of the evidence that they care to offer and after the attorneys have had the opportunity to argue the case to you, it becomes my duty to give the Court's charge.

By that I mean I will discuss with you your function here as jurors; I will instruct you upon the law of the case and discuss the case with you to some extent.

First, as to your function.

Whenever it occurs in the trial of a case that there is a dispute in the evidence, one witness or a series of witnesses testifying that events happened in one fashion, other witnesses or a series of witnesses testifying that the events (588) happened in a contrary fashion, or if they—even if there be no dispute in the evidence, where there is a situation where the jurors must consider their testimony and determine what weight to be given to it; that is, whether it meets the burden imposed by law upon the Government to prove the defendant's guilt beyond a reasonable doubt—in those situations someone must weigh and consider that testimony; someone must determine what is credible and worthy of belief and what is not. Someone must determine where the facts lie. That is the function of you ladies and gentlemen who compose our trial jury serve.

You are the fact-finding arm of the Court. In weighing and considering the testimony you are entitled to accept as true and credible everything that a particular witness may have said, or you are permitted to reject everything that a particular witness may have said.

(589) You may accept part of the testimony of a witness and reject other portions of the testimony of that same witness.

You may want to consider the manner in which the defendant testifies, the impression you got of him while he

was on the stand; you may want to consider whether or not the testimony which he gave seems to be reasonable and consistent with ordinary experience. You may want to consider whether he had any interest in the outcome of the case.

In that respect, it's sometimes suggested that the Government employees, the customs agents or the customs inspectors or others are sort of prosecution-minded in that they may color their testimony, intentionally or not, to favor the Government, to make a little bit stronger case against the defendant than perhaps the facts warrant.

On the other hand, it's also argued that the defendant has the greatest interest in the outcome of the case and that (590) there is a tendency or an inclination for the defendant to color his own testimony because of his great interest.

Those are simply some factors or considerations that you may want to take into account in passing upon the credibility of the witnesses.

I instruct you that you are the exclusive judges of the facts proved and of the credibility of the witnesses and of the weight to be given their testimony.

Now, in this Court I should tell you, too, that the judge is permitted, if he sees fit to do so, to comment upon the evidence.

By that I mean I am permitted to tell you what I think about the credibility of the witnesses, about what I think about the weight of the testimony or even permitted to tell you what verdict I think you should return.

While I expect to discuss the facts in the case with you to some extent, I instruct you now that if from my remarks you draw some conclusion or inference (591) as to my feelings about the facts or about the credibility of the witnesses, it's not intended as an effort on my part to tell you what your verdict or your findings should be. Anything

that I say about the facts or about the witnesses is intended to be of some possible help to you in your consideration of the case and you are entirely justified and warranted in disregarding anything I have to say about the facts or about the witnesses or their credibility. That is your exclusive province and I have no desire to trespass upon it.

The law of the case you will take from the court and be governed thereby.

Now, I instruct you, ladies and gentlemen, that this defendant, as is true of every defendant brought to trial in this court, is presumed at the outset to be innocent.

The defendant starts off with a clean slate, and by pleading "not guilty," as he has done here, has imposed upon the (592) government to prove his guilt to you beyond a reasonable doubt.

By the term "reasonable doubt" as I use it here, is meant such a doubt as may arise in your minds when, after fully and impartially considering all of the evidence, the jurors do not feel satisfied to a moral certainty of the accused's guilt.

A "reasonable doubt" does not mean a mere possible or imaginary doubt or a mere conjecture; a "reasonable doubt" is one which appeals to and is based upon your reason.

If after fully and impartially considering all of the evidence you have a reasonable doubt as to the guilt of the defendant, it's your duty to acquit.

On the other hand, if after fully and impartially considering all of the evidence you are convinced beyond a reasonable doubt of the guilt, then it's your duty to convict.

Now, let us see what it is the defendant is charged with having done, what statutes, (593) what laws he is charged with having violated.

The indictment is in three counts.

The first count, for brevity, I will refer to as the smuggling count.

G. Trial Judge's Charge to Jury

The second I will refer to as the transportation count;

And the third as the tax count.

Failing to—being a transferee, required to pay a certain tax, having transported and concealed the marihuana without the tax having been paid.

The first count, as to the smuggling of the quantity of the marihuana into this country I am withdrawing from your consideration, my reason being that for certain technical reasons as to whether or not there was, in fact, a smuggling of the marihuana under the circumstances shown to exist. So you, ladies and gentlemen, may disregard Count 1.

Count 2 I will read to you briefly.

That on or about the December 22, in the Laredo division of the Southern (594) District of Texas, this defendant and his daughter, Susan, whose guilt or innocence you are not concerned with, with intent to defraud the United States, did unlawfully and knowingly transport and facilitate the transportation and concealment of three ounces of marihuana, more or less, after importation, and the defendants then and there knew the said marihuana to have been imported into the United States contrary to law, in violation of 176(a) of Title 21 of the United States Code.

Now, you will note that a reference is made to three ounces of marihuana in the indictment.

The proof shows, as I understand it, that there was not three ounces but about a half an ounce.

I instruct you that that variance—that difference is not material, that the government is not obliged to prove exactly the amount of the narcotics alleged in the indictment and that you—(595) that if you find the defendant to have been guilty of to the half ounce, as shown by the evidence, you may disregard the discrepancy, between the three ounces, as alleged here, and the half ounce, as shown by the proof.

G. Trial Judge's Charge to Jury

The third count charges with respect to the same small amount of marihuana, that at the same time and place the defendant, and Susan, transferees, required to pay the transfer tax imposed by the Internal Revenue Code, did unlawfully and knowingly transport, conceal and facilitate the transportation and concealment of a quantity of marihuana without having paid the transfer tax imposed by the said code, in violation of Section 4744(a)(2) of Title 26 of the Code.

Now, I want to read the statutes to you which the defendant is alleged to have violated.

Section 176(a) of Title 21 of the United States Code, in pertinent part, reads as follows:

(596) Notwithstanding any other provision of law, whoever knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced—

Now, that has to do with count 1, which I am withdrawing from your consideration. Or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, shall be punished as the statute thereafter provides.

With the further paragraph:

Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had marihuana in his possession, such possession shall be deemed sufficient evidence as to (597) authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

What that means, of course, is this:

If the defendant be shown to have had the marihuana in his possession in the United States, such possession

shall be deemed sufficient evidence to authorize conviction unless he explains his possession to the satisfaction of the jury. That means, unless he proves to your satisfaction that it was a lawful and a legitimate possession of the marihuana which he had.

The other statute alleged to have been violated is 4744 (A)(2) of Title 26 of the code, reading in pertinent part as follows:

It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by Section 4744 (A)(1) to acquire or otherwise obtain any marihuana without having paid such tax or, to—and this is the part that we are interested in—to transport (598) or conceal or in any manner facilitate the transportation or concealment of any marihuana so acquired or obtained.

Proof that any person shall have in his possession any marihuana and shall have failed after reasonable notice and demand by the secretary or his delegate to produce the order form required by Section 4742 to be retained by him, shall be presumptive evidence of guilt under this subsection.

I should tell you in connection with this statute what perhaps you already know from the evidence which has come out here before us on the stand.

The law recognizes that marihuana has some legitimate uses. Doctors, veterinarians, dentists and certain chemists, for experimentation purposes may secure from the proper officials of the United States Government the necessary permit to possess and handle marihuana for those legitimate purposes.

The handling of the product, however, is closely controlled by statute and the (599) sections referred to here are those which impose that control upon the handling of marihuana.

One of them requires, as you will understand from the section which I have read, that when a transfer is made

from one person to another such a transfer is taxed—a tax is imposed upon it—and the transferee should, if it be a legitimate transfer, receive a so-called order form, which is a form which may be procured from proper government officials to show that the transfer is, in fact, a legitimate one and that the tax has been paid and the transferee—that is the person who receives it, is obliged to keep that order form in his possession so that if the marihuana be discovered in his custody or in his possession he may show the order form to show that it was legitimate.

And as you will notice, the law provides that proof that any person shall have had in his possession any marihuana and (600) shall have failed, after reasonable notice and demand by the secretary of his delegate to produce the order form, shall be presumptive evidence of guilt under this subsection.

The reference to these—to the secretary or his delegate means—well, I will say this:

The customs agents would qualify. They would be a delegate of the secretary of the treasury, one of those referred to as being a proper person to make demand for such order form.

Now, it is charged that these acts were done unlawfully, knowingly, willfully and with the intent to defraud the United States.

I want to define those term to you.

"Unlawfully", as used here, means simply contrary to law or in violation of law.

The term "knowingly", as used here, means with knowledge; that is, an act is done knowingly when it's done with knowledge and not accidentally or (601) inadvertently or carelessly or by honest mistake.

The word "wilfully", as used here, means that an act is done voluntarily and purposely and with intent to do that which the law forbids, that is, with a purpose either to disobey or to disregard the law.

The term "with intent to defraud", means to act knowingly and with specific intent to deceive or to cheat.

All right. So much for the law of the case.

I want to discuss the evidence with you, and its application to the law as I have given it, as best I can.

I hope and believe that I can simplify the case for you a great deal and I hope to be able to direct your attention to the essential elements and to make it clear to you.

We have heard much testimony here about foreign religions. We have heard testimony that the defendant considered his use of the narcotic which he admitted from the stand was a religious (602) experience.

We have heard testimony that he considered it a scientific or an experimental use on some occasions.

These matters, ladies and gentlemen, I instruct you are of no real significance here, for the reason that if you find beyond a reasonable doubt otherwise the defendant is guilty of the charges here before him, the fact that he may, in good faith—and I am assuming that he was acting in good faith in stating this to you—the fact that he may, in good faith, have considered his use to be in pursuit of the tenets of his religion; the fact that he may have considered it to have been for experimental and scientific purposes; the fact that he may even, for reasons of his own, have considered that the law didn't apply to him, that he shouldn't have been required to secure a permit from the government as other scientists or doctors do, is no defense to the charges here made.

(603) And if you find beyond a reasonable doubt that he committed the acts as charged knowingly, wilfully, unlawfully and with the intent to defraud, as alleged—the fact that he may have considered this to be a religious experience, a scientific experiment, is no defense and you—it would be your duty to convict.

On the other hand, if you have a reasonable doubt that, in fact, he committed the acts as charged, or that he did

so unlawfully, knowingly and wilfully or with the intent to defraud, it would be your duty to acquit.

Now, as to the evidence in the case, it seems to me that it has become a relatively simple matter.

The Government offered testimony, as I remember it—and I will state to you that in all of this discussion of the evidence I am relying only on my own memory and if your recollection is different, by all means, rely upon your own.

(604) As I recall it, the Government's testimony was essentially this:

The car returned to American customs from the Mexican side of the river. Mr. Best, the customs inspector there on the line, gave it a rather cursory inspection, but happened to notice what he thought to be marihuana seeds on the floor board and, of course, that aroused him to greater activity.

He asked the occupants all to step out, took them inside, asked a few questions.

At that time, the defendant, Dr. Leary, who told him—as I recall Best's testimony—that Dr. Leary did not smoke marihuana; he didn't use narcotics; he knew nothing about any marihuana seeds that might have been on the floor of the car.

However, the officers decided on a more thorough search and a more thorough search disclosed that Susan was secreting the silver snuffbox of marihuana.

When confronted with this and after the (605) customs agent, Mr. Hatch, had been called—as I recall Hatch's testimony, it was to the effect that Dr. Leary admitted at that time that he did use marihuana; that this was his, but that his use of it was purely for scientific and experimental purposes and essentially that he didn't consider he ought to be subject to the provisions of law for that reason.

He told Mr. Hatch, as I remember it, and I believe he told us here on the witness stand, that he had acquired this quantity in New York as a gift from a friend. He told

us of having brought it from New York to Laredo and having stopped on one occasion in New Orleans for the night and having made use of a portion of the marihuana at that time, and proceeded from there on to this city.

He told us, as I recall it, that he stopped in this city to make inquiry as to the necessary papers and the insurance he would need in Mexico at the Triple-A (606) office;

That thereafter he proceeded to the International bridge, crossed the bridge into Mexico and had the discussion with the Mexican customs, or perhaps immigration officials on that side;

Becoming somewhat apprehensive about whether he might be violating the Mexican laws he told his group of friends to dispose of all the marihuana in the car;

Being compelled to return across the bridge to Texas, he learned only shortly before driving up to the customs house that the marihuana was still present and that Susan was hiding it.

I believe that is about the sum and substance of the testimony which I consider most controlling from both the Government and for the defense.

The second count which I discussed with you earlier, you will notice, charges the transportation and facilitating the transportation and concealment of the marihuana within this district and division.

(607) Counsel for the defendant have argued to you that you should direct your attention to the period of time after the defendant learned that Susan still had the narcotic and until his vehicle arrived at the customs station, a very short distance while the car was moving upon American soil.

That has overlooked the evidence from Dr. Leary himself, as I remember it, which is to the effect that at all times from New York to New Orleans to Laredo, during the stop at the AAA station and prior to entering Mexico,

by his own admission, as I understood his testimony, he had the marihuana in his possession; he knew he had it in his possession; he knew it was in violation of the laws of the United States.

During that period of time there is no question as to whether he knew or didn't know that it was in the car, whether he knew or didn't know that someone had thrown it out and the (608) uncertainties and the questions that arise from the testimony, if you look at the case only during the short interval prior to arriving at Mexican customs.

Similarly, with regard to the third count. It charges that Dr. Leary was a transferee, required to pay the transfer tax.

He has told us that he had received the narcotic in New York. It's charged that he transported it, concealed it and facilitated the transportation and concealment of it without having paid the tax, in violation of Section 4744 (A)(2) of the Code:

When demand was made at the bridge for the order form, the agent told you that he said that he had no such order form in his possession.

And the statute which I have read to you with regard to this third count provides that failure to produce the order form shall be presumptive evidence of guilt under this subsection.

(609) Now, you might have some difficulty with the question on Count 2 by reason of the fact that the statute requires the the defendant receive—by reason of the fact that the statute provides that one who receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of such marihuana, after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, shall be punished as the statute provides.

The Government is entitled to rely upon the presumption which I read to you earlier; that is, whenever on trial for

a violation of this subsection the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains his possession to the satisfaction of the jury.

(610) I mention this a second time because you might be confused about the question of importation.

We are not talking necessarily about the importation or what the government contends was importation here at the bridge.

The defendant has told us that he received the marihuana in New York. This statute, of course, is of application throughout the land and the presumption would still apply that the narcotic had been imported illegally and that he knew it had been imported illegally unless he explains his possession to the satisfaction of the jury.

I have defined the terms "unlawfully, knowingly, wilfully, and with intent to defraud."

It's alleged that the acts of the defendant were done unlawfully, knowingly, wilfully and with intent to defraud, and you must so find beyond a reasonable doubt to convict.

I instruct you, ladies and gentlemen, (611) further that the indictment here, which you may take with you to the jury room, is the charge upon which this defendant is brought to trial; it's not evidence of guilt; it's not evidence of anything; it's simply the charge. You may consider it to determine what it is he is charged with having done. You will not consider it any evidence of his guilt in this case.

I instruct you further that in the event of a finding of guilty, in this Court the sentence to be imposed is the sole responsibility of the Court; it's not the responsibility of the jury.

Hence, you ladies and gentlemen will not consider or discuss the possible sentence to be imposed in the event of a finding of guilty.

G. Trial Judge's Charge to Jury

I think that concludes what I have to say to you, ladies and gentlemen, except the fact that the lawyers are entitled to object to my instructions to you outside of your presence and hearing.

(612) If you will follow the Bailiff into my office just for a moment, I will give them a chance to do that.

Anything from the Government?

(Jury retired from the courtroom at 11:55 A.M., March 11, 1966, * * *

* * *

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IN THE

Supreme Court of the United States

October Term 1968

No. [redacted] 65

TIMOTHY F. LEARY,

Petitioner,

against

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

ROBERT J. HAFT,
140 East 80th Street,
New York, N.Y. 10021.

JOEL JAY FINER,
2500 Red River,
Austin, Texas.

Counsel for Petitioner.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement	4
Reasons for Granting the Writ	7
As to Question I	7
As to Question II	10
As to Question III	12
As to Question IV	14
As to Question V	15
APPENDIX A—Opinion of the United States Court of Appeals for the Fifth Circuit affirming the decision of the District Court	1a
APPENDIX B—Opinion of the United States Court of Appeals for the Fifth Circuit denying Petition for a Rehearing	35a
APPENDIX C—Judgment of the United States Court of Appeals for the Fifth Circuit	39a
APPENDIX D—Constitutional and Statutory Provisions Involved	40a
APPENDIX E—Correspondence between the United States Attorney and Counsel for Petitioner	42a

Citations

PAGE

CASES:

Brady v. *Maryland*, 373 U.S. 83 (1963) 11

Chapman v. *California*, 386 U.S. 18 (1967) 10

Giles v. *Maryland*, 386 U.S. 83 (1963) 11

Grosso v. *United States*, 390 U.S. 39 (1968) 2, 7, 8

Haynes v. *United States*, 390 U.S. 62, 1968 ..... 2, 7, 8

In Re Grady, 39 Cal. 912 (1964) 15

Levin v. *Katzenbach*, 363 F. 2d 287 (D.C. Cir. 1966) 11

Marchetti v. *United States*, 390 U.S. 85 (1968) 3, 7, 8

People v. *Woody*, 40 Cal. 69 (1964) 15

Russell v. *United States*, 369 U.S. 749 (1962) 13

Sherbert v. *Verner*, 374 U.S. 398 (1963) 15

Constitutional and Statutory Provisions

AMENDMENT I TO UNITED STATES CONSTITUTION ... 1, 3

AMENDMENT V TO UNITED STATES CONSTITUTION . 1, 3

18 U.S.C. § 4208(b) 2

21 U.S.C. § 176a 2, 3, 4, 5, 9, 14

26 U.S.C. § 4741(a) 2, 3, 7

26 U.S.C. § 4742(a) 2, 3, 7

26 U.S.C. § 4744(a) 2, 3, 4, 7

28 U.S.C. § 1254(1) 2

IN THE

Supreme Court of the United States

October Term 1967

No. .....

TIMOTHY F. LEARY,

Petitioner,

against

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on September 29, 1967.

Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit (Appendix A, pages 1a-34a), is reported at 383 F.2d 851 (1967); its opinion denying Petitioner's application for rehearing (Appendix B, pages 35a-38a) has not yet been officially reported. The Court of Appeals affirmed the judgment of the District Court for the Southern District of Texas, Laredo Division. No opinion was rendered by the District Court.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on September 29, 1967, (Appendix C, page 39a). On October 20, 1967, an application was made for rehearing. The application was denied in a decision dated March 29, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Petitioner has been convicted and sentenced to a maximum prison term of 30 years and fined $40,000, subject to the provisions of 18 U.S.C. § 4208(b), for offenses relating to Petitioner's alleged possession of less than one-half ounce of marihuana (Transcript* 640-44). Specifically, Petitioner was found guilty of violating 21 U.S.C. § 176a (unlawfully and knowingly transporting illegally imported marihuana, with intent to defraud, with knowledge of illegal importation) and 26 U.S.C. § 4744(a)(2) (unlawfully and knowingly transporting marihuana, as a transferee required to pay the transfer tax, without having paid such tax (Tr. 44, 45, 637-638)).

The questions presented herein are:

I. Whether the registration and tax provisions in 26 U.S.C. Sections 4741(a), 4742 and 4744(a), as applied to Petitioner, violate his privilege against self incrimination protected by the Fifth Amendment to the United States Constitution and his rights thereunder as amplified by this Court in three recently decided cases: *Marchetti* v. *U.S.*, 390 U.S. 39 (1968); *Grosso* v. *U.S.*, 390 U.S. 62 (1968); and *Haynes* v. *U.S.*, 390 U.S. 85 (1968).

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* References to Transcript will hereafter be noted as Tr.

II. Whether the basic rights of due process and fair trial under the Fifth Amendment were denied by the prosecution's non-disclosure that its sole rebuttal witness was under two federal indictments at the time of trial, while the prosecution obstructed discovery thereof on cross-examination of the witness; vouched for his credibility; and, sought to discredit Petitioner's entire testimony on the basis of the rebuttal witness' testimony.

III. Whether Petitioner was denied his basic right to a fair trial by the conduct of the District Court in propounding, for the first time in its charge, theories of criminal liability markedly different from those upon which the prosecution and the defense relied throughout the trial.

IV. Whether Petitioner was denied due process under the Fifth Amendment by the application, under the circumstances of this case, of the provisions of 21 U.S.C. § 176a, providing that an inference may be drawn respecting the illegal origin and nature of marihuana solely from possession thereof.

V. Whether in view of the evidence presented as to Petitioner's religious beliefs, the application to him of the Federal Statutory provisions here involved constitutes an unconstitutional impairment of his religious liberty guaranteed by the First Amendment to the United States Constitution.

Constitutional and Statutory Provisions Involved

The pertinent provisions of the United States Constitution (Amendments I and V) and Statutes of the United States (21 U.S.C. § 176a; 26 U.S.C. §§ 4741, 4742 and 4744) are set forth in Appendix D, at pages 40a-41a.

Statement

The conviction of Petitioner and the substantial jail sentence he faces arise out of a round-trip automobile journey lasting less than one hour, across the International Bridge connecting Laredo, Texas with Mexico (Tr. 70, 71, 315). Specifically, the testimony upon the trial disclosed that Petitioner, on December 22, 1965, had driven, with four passengers south across the International Bridge to the Mexican Customs Station and, without leaving the Station, and after apparently being denied entry, returned northward across the bridge (Tr. 74, 137-38, 315-328). Petitioner was stopped at the American Customs Station on his return and he and the other passengers, including his eighteen year old daughter were thoroughly searched (Tr. 74-75, 109, 331-333). Sweepings of marihuana were found in the rented automobile and a small quantity was found on the person of Petitioner's daughter. A total of less than one-half ounce of marihuana was thus discovered (Tr. 81, 82, 90, 109, 177, 184-5).

Petitioner was charged with violating 21 U.S.C. § 176a and 26 U.S.C. § 4744(a)(2). The indictment charged him with smuggling marihuana as well as with the illegal transportation thereof.

Upon trial, the District Court, over the prosecution's objection withdrew the charge of smuggling, it being clear that no evidence was presented to justify an inference that Petitioner had acquired the small quantity of marihuana during his short stay in the Mexican Customs Station.

It was urged on behalf of Petitioner that the same reasoning applicable to the dismissal of the smuggling count, i.e., his lack of importation of marihuana, should serve to compel the withdrawal of the transportation charge. The District Court, however, in its charge to the jury, and over Petitioner's timely objection, (Tr. 613-14) took the position

that Petitioner's testimony that he had knowingly possessed marihuana during the trip to Mexico, together with the illegal importation presumption, under 26 U.S.C. § 176a, arising from mere possession, formed a sufficient basis for conviction (Tr. 607-08, 610).

Testimony was introduced through Petitioner and other witnesses, including expert witnesses, with respect to Petitioner's religious beliefs and his use of marihuana as a part thereof (Tr. 267-312, 402-18, 422-34). The District Court, however, despite Petitioner's request therefor (Tr. 617), refused to charge that, assuming the sincerity and honesty of Petitioner's belief and use of marihuana in connection therewith, such religious beliefs would serve to constitute a defense to the crimes charged (Tr. 527-28).

In connection with the presumption of illegal importation which arises solely from the possession of marihuana, Petitioner had specifically denied importing the small quantity of marihuana and denied any knowledge that it was imported marihuana (Tr. 349). In addition to urging the basic unfairness and incriminatory nature of the statutory presumption contained in § 176a, Petitioner also attempted to show the arbitrary and irrational nature of said presumption through testimony showing the quantity of domestically grown marijuana as opposed to imported marihuana. The District Court, however, refused to allow any detailed testimony bearing on this point (Tr. 165, 517) and denied Petitioner's timely motion (based, in part, on the irrationality of the presumption) for a directed verdict of acquittal on the transportation count (Tr. 492).

As an attack upon Petitioner's attempt to rebut the presumption and upon the sincerity of his religious beliefs, the prosecution called as its sole rebuttal witness one Cutler, who directly contradicted Petitioner's testimony relating to the occasions upon which he used marihuana (Tr. 449-50). The prosecution, in summation, relied heavily

upon Cutler's testimony to argue to the jury that Petitioner's credibility had been completely impeached and that Petitioner's entire testimony should be disregarded (Tr. 543-45, 548). Petitioner's testimony that he did not know the source of the marihuana (Tr. 349) if believed would alone have led to his acquittal.

However, the prosecutor did not disclose until November 25, 1966, eight months after the judgment of conviction, that Cutler was, at the time of the trial: (a) under indictment in the United States District Court for the Southern District of California for smuggling approximately 25 pounds of marihuana and 50 dexedrine capsules into the United States from Mexico; (b) under indictment in the same court for bail jumping in connection with the smuggling charge; and (c) subject to a bench warrant previously issued by the United States District Court for the Southern District of California for his arrest in both of the above matters. (A copy of the correspondence between Counsel for Petitioner and the United States Attorney relating to the aforesaid pending indictments against Cutler is annexed as Appendix E, pages 42a-45a.)

In addition to the non-disclosure of this vital impeachment information, the prosecution made repeated reference in its closing argument to Cutler's testimony as an unqualified demonstration that the jury "would be justified in rejecting everything . . . that [Petitioner] testified to from the witness stand" (Tr. 543). (See also Tr. 548, 580-581.) It argued in its closing:

> "Now, they didn't even attack the testimony of this witness, Cutler. They could have but they didn't. *We submit that it's the truth*; if it wasn't the truth it would have been attacked. *There is no reason to disbelieve this man*—no *motivation* for him to falsify or no bad feelings toward Dr. Leary. He just testified to the *facts*, which are that they were smoking marihuana in Greenwich Village before he went to India. And all this other stuff, I submit, is just hogwash . . ." (Tr. 544-545) (Emphasis added).

The prosecution compounded its non-disclosure by affirmatively obstructing the discovery of such information by the defense by a seemingly innocent objection to the question: "How many times have you been picked up for smoking marihuana?" (Tr. 462). The Court sustained this objection and defense counsel went on to inquire as to conviction of a felony, which was denied by the witness.

Finally, Petitioner had asserted that the registration and tax provisions contained in 26 U.S.C. Sections 4741(a) and 4742, upon which the charge of violating Section 4744 (a) (2) was predicated, violated his constitutional privilege against compulsory self-incrimination (Tr. 651).

REASONS FOR GRANTING WRIT

As to Question I

With respect to the constitutionality under the Fifth Amendment of the registration and tax provisions in 26 U.S.C. 4741(a) and 4742, it is submitted that the decision below conflicts directly with this Court's recent decisions in *Marchetti* v. *U.S.*, 390 U.S. 39 (1968); *Grosso* v. *U.S.*, 390 U.S. 62 (1968); and *Haynes* v. *U.S.*, 390 U.S. 85 (1968). These cases, involving determinations as to the self-incriminatory nature of similar registration and tax provisions relating to wagering and possession of firearms, had not been decided at the time the Court of Appeals for the Fifth Circuit originally rendered its decision. On reargument, however, these decisions were specifically called to the attention of the Court of Appeals. That Court sought to distinguish these cases, on the ground that the existence of certain circumstances under which the possession of marihuana might not be unlawful relieves that statute of its incriminatory nature. (See Opinion denying Rehearing at Appendix B, Pages 36a-38a.) Petitioner respectfully sub-

mits, however, that the Court of Appeals' reliance upon the apparent fact that pharmacists and physicians may lawfully possess marihuana in Texas is misplaced. This Court in the *Marchetti, Grosso* and *Haynes* cases, nowhere implied that the admittedly self-incriminatory nature of a statutory provision when applied to a particular defendant may be sanctioned because of the existence of exceptions which would allow other classes of individuals to comply with the statute without incriminating themselves. Rather, the burden of these three decisions is directly contrary. Indeed, this Court in *Haynes* appears to have considered and rejected the distinction raised by the Court of Appeals:

> "It is true, as the United States emphasizes, that registration is not invariably indicative of a violation of the Act's requirements: there are situations, which the United States itself styles 'uncommon', in which a possessor who has not violated the Act's other provisions is obliged to register. Nonetheless, the correlation between obligations to register and violations can only be regarded as exceedingly high, and a prospective registrant realistically can expect that registration will susbtantially increase the likelihood of his prosecution. Moreover, he can reasonably fear that the possession established by his registration will facilitate his prosecution under the making and transfer clauses of § 5851. In these circumstances, it can scarcely be said that the risks of criminal prosecution confronted by prospective registrants are 'remote possibilities out of the ordinary course of law'. *Heike* v. *United States,* 227 U.S. 131, 144; yet they are compelled, on pain of criminal prosecution, to provide to the Secretary both a formal acknowledgement of their possession of firearms, and supplementary information likely to facilitate their arrest and eventual conviction. The hazards of incrimination created by the registration requirement can thus only be termed 'real and appreciable'. *Reg.* v. *Boyes,* 1 B. & S. 311, 330; *Brown* v. *Walker,* 161 U.S. 599—600." 390 U.S. at 96-97.

Further, the Court of Appeals attempted to distinguish the present situation by asserting that Petitioner's testimony, explaining his possession and use of marihuana in defending himself against all counts of the indictment, amounted to a waiver of his privilege against self-incrimination (Appendix B, page 38a). In the circumstances of this case, such a distinction is totally untenable. If the opinion of the Court of Appeals is allowed to stand then any person charged under indictments similar to those under which Petitioner was tried becomes faced with an insoluble dilemma: on the one hand he is required to testify as to the facts surrounding his possession of marihuana in order to rebut the presumption of illegality arising from mere possession under § 176a; on the other hand if he does so testify, following the Court of Appeals reasoning, this very act of defending himself against that crime amounts to a waiver of his constitutional rights with respect to the charges growing out of the registration and tax provisions. In short, by the simple expedient of having multiple counts in the indictment, the constitutional privilege is effectively destroyed. This thoroughly unconscionable result must follow if the argument of waiver in the decision below is allowed to stand.

The importance of a ruling by this Court upon the self-incrimination issue as applied to narcotics prosecutions cannot be minimized: narcotics cases represent a large portion of federal criminal prosecutions. It is in such cases, particularly, that a defendant usually faces the double dilemma counts of tax liability and illegal transportation (or smuggling).

Finally, it must be emphasized that the constitutional infirmity here affects Petitioner's conviction under both counts of the indictment. It colored the entire conduct of the trial and the charge to the jury. The incriminatory nature of the registration and tax provisions appear inextricably tied to the similarly self-incriminatory effect of seeking to rebut the statutory presumption under § 176a.

As to Question II

Initially, it is submitted that this Court, as part of its overall supervisory obligations with respect to the administration of federal criminal justice, should condemn the conduct of the prosecution in connection with its rebuttal witness Cutler and should reverse the decision below—even if no prejudice be demonstrated. See *Chapman* v. *California*, 386 U.S. 18 (1967) and the cases collected therein. There is, as Mr. Justice Harlan in his dissent there noted:

> "... a recognition that certain types of official misbehaviour require reversal simply because society cannot tolerate giving final effect to a judgment tainted with such intentional misconduct. E.g. *Berger v. United States*, 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (prosecutorial misconduct)." *Id* at 52, note 7.

Alternatively, the error here was by no means "harmless". In view of the statutory presumption, the question of Petitioner's credibility was in no sense "peripheral" but was the central issue of the case. It was up to the jury to decide whether to believe Petitioner in his attempt to rebut the presumption of illegality. This attempt was met by the prosecution's use of the rebuttal witness, Cutler. The prosecution in its closing chose to cast the case as a credibility contest between Cutler and Petitioner:

> "Now, I say to you has he explained it to your satisfaction? We have proved to you that he didn't tell you the truth about how to use marihuana [sic]. We have impeached him and I submit you should disregard his testimony that he has not [sic] explained it to your satisfaction." (Tr. 548).

The impropriety here was exacerbated by the prosecution itself affirmatively vouching for the witness:

> "Now, they didn't even attack the testimony of this witness, Cutler. They could have but they didn't. *We submit that it's the truth;* if it wasn't the truth it would have been attacked. *There is no reason to disbelieve this man*—no *motivation* for him to falsify or no bad feelings towards Dr. Leary . . ." (Tr. 544-545) (Emphasis Added)

The jury "would be justified in rejecting everything . . . [Petitioner] testified to from the witness stand" (Tr. 543). The prosecution also prevented discovery of the vital impeachment evidence during cross-examination of Cutler (Tr. 462).

Cutler was a man then and there subject to immediate arrest and prosecution which could result in his incarceration, for not less than five years without parole and as long as most of the remaining years of his life.

It is submitted that the Court of Appeals opinion here in so lightly dismissing the impact of these improprieties places that Court at variance with other courts (e.g., *Levin* v. *Katzenbach*, 363 F.2d 287 (D.C. Cir. 1966)) and militates against the increasing concern shown by this Court over conduct by Federal prosecutors inimical to a fair trial. See *e.g. Giles* v. *Maryland*, 386 U.S. 66 (1967); *Brady* v. *Maryland*, 373 U.S. 83 (1963).

As to Question III

This question involves the definition of a fair trial and of the role of the judge vis-a-vis the prosecutor in federal criminal trials. The issue arises out of the theory upon which this case was prosecuted and the application of that theory to an indictment that was fortuitously broad. The prosecution consistently throughout the trial relied, with respect to all counts of the indictment, upon the theory that the marihuana had been illegally imported from Mexico into Texas (Tr. 524, 526, 349, 354, 387-89).

The defense was twice denied a bill of particulars as to whether the prosecution was basing its case on possession and transportation prior to entering Mexico or from Mexico into Texas (Tr. 25-26, 41-42). The prosecution's case in chief consisted of six witnesses, none of whom testified on direct examination to any transaction other than Petitioner's return from Mexico. On this basis, defense counsel elicited the fact that Petitioner admitted that he had acquired the marihuana in New York prior to his trip to Mexico (Tr. 155). The prosecution's cross-examination of Petitioner and his witnesses sought to prove that the marihuana had been acquired in Mexico (Tr. 349, 354, 387-389).

Petitioner testified that he acquired the marihuana in New York (Tr. 313); drove from New York through Laredo, Texas, across the International Bridge, to the Mexican Customs Station (Tr. 315). Petitione was told that he would not then be given entry papers and would have to return the next morning (Tr. 321). Petitioner started back across the bridge, believing that there was no marihuana in the automobile at that time (Tr. 322-326). Just prior to reaching the United States Custom Station, Petitioner realized they would "have to go through customs on the American side" and asked "Is all of the marihuana out of the car?" His daughter replied "No, that the marihuana had just been

found and that she had it" (Tr. 328). In closing, defense counsel contended that Petitioner thus did not have the *mens rea* required for conviction when entering the United States from Mexico (Tr. 552-560).

At the close of the trial, the prosecution reaffirmed that:

> "Our theory is that this a bridge case. . . . They were caught at the bridge coming in from Mexico . . . and the only evidence to show that he had it before he left the country is his own testimony. The jury has the right to reject that in its entirety, as we plan to argue that they should" (Tr. 524).

The trial judge, however, in his charge gave no weight to the prosecution and defense theory predicated upon the Mexico to Laredo trip and directed the jury's attention almost exclusively to Petitioner's testimony:

> "to the effect that at all times from New York to New Orleans to Laredo, during the stops at the AAA station and prior to entering Mexico, by his own admission, as I understood his testimony, he had the marihuana in his possession; he knew he had it in his possession; he knew it was in violation of the laws of the United States . . ." (Tr. 607).

This pointed charge coupled with his charge excluding in substance all defenses raised by the Petitioner and his repeated emphasis of the presumptions, left the jury with little or no choice except to convict Petitioner on the judge's last-minute north-south theory (Tr. 587-615).

This Court, under its supervisory powers, should make clear that the orderly administration of federal criminal justice requires that the theory of criminal liability to be defended against be fixed at the early stages of the trial, either by a bill of particulars or by the prosecution in its case-in-chief, and not by the court after both sides have rested. That there may be other facts which, purely by calendar-coincidence, would support conviction under a theory

not urged by the prosecution, should in no way alter the requirements that a conviction for a major crime be predicated upon evidence supporting beyond a reasonable doubt the theory of wrongdoing consistently urged by the prosecution. Petitioner's defense was predicated upon the prosecution's theory and he was substantially prejudiced by the trial judge's subsequent reversal of theory.

More is here involved than the mere switching of theories of criminality engaged in by the prosecution and condemned by this Court in *Russell* v. *U.S.*, 369 U.S. 749 (1962). Here there was a confusion in role as between the trial judge and the prosecutor as well as a reversal in theory. Under the circumstances of the case, this is a matter peculiarly within the supervisory function of this Court.

As to Question IV

The presumption in § 176a, which authorizes a jury to find that marihuana has been illegally imported with knowledge of the defendant solely on the basis of his possession thereof, involves two issues. Firstly, whether the existence of such a presumption with the concomitant compulsion upon the defendant to explain his possession, serves to deprive the defendant of his protection against incrimination. Secondly, whether the presumption created in § 176a is, in light of present knowledge and as applied to the circumstances of this case, reasonable or arbitrary. The petitioner sought to offer evidence to put in issue the rationality of presuming that any particular quantity of the ubiquitous marihuana weed was grown outside of the United States. This offer was rejected (Tr. 165, 517).

As to Question V

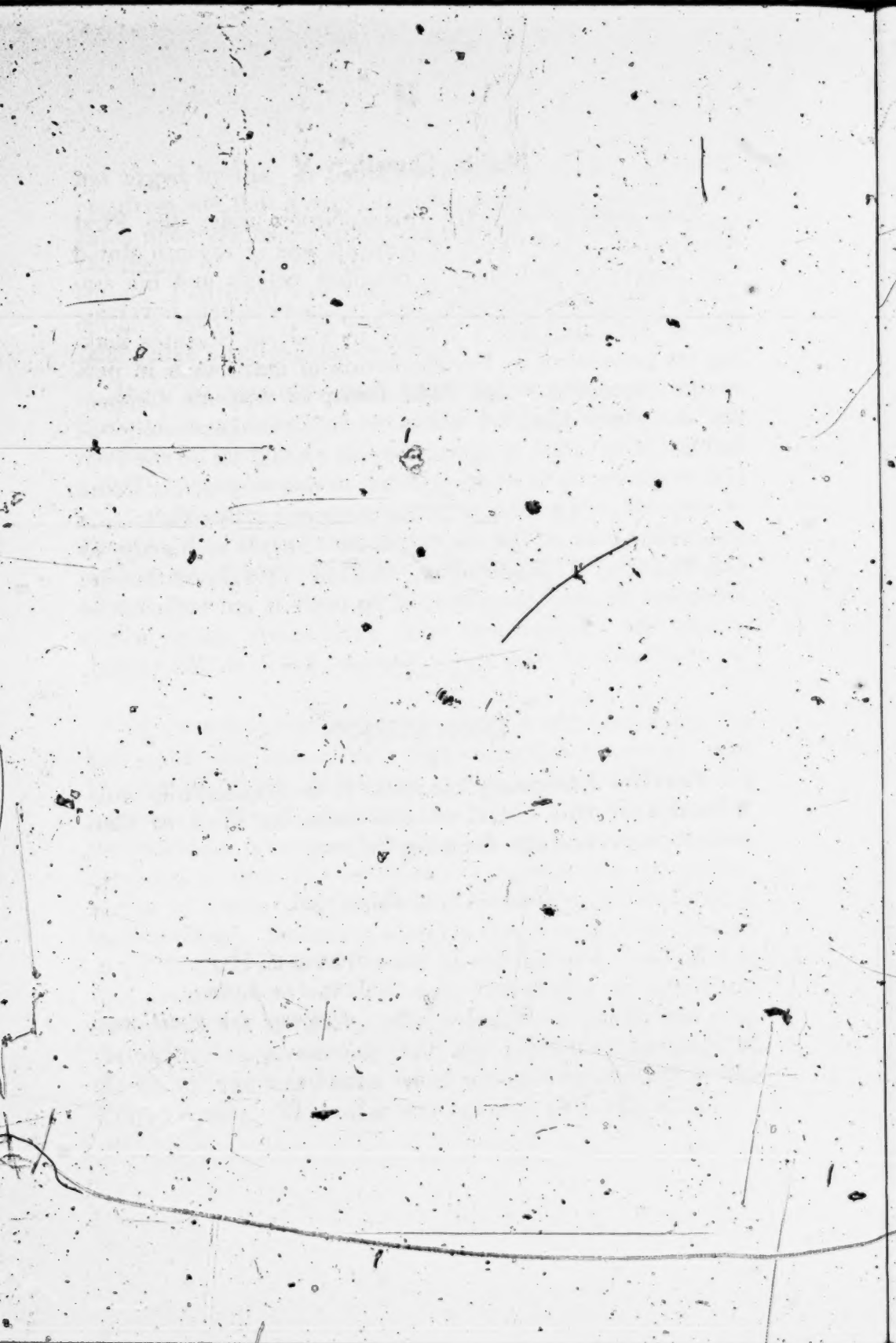
This question directly raises issues under the First Amendment. The Court of Appeals has in essence stated that, accepting Petitioner's religious beliefs and his sincerity with respect thereto, such religious beliefs nevertheless do not constitute a defense to Federal Statutes making his possession or transportation of marihuana in pursuance thereof a crime. The Court of Appeals (Appendix A, pages 12a-17a) chose to balance these religious rights against what it saw as an evil combatted by the Federal Statutes. It is submitted that in this respect the Court of Appeals is in conflict with the decisions of the California Supreme Court on the use of peyote (*People* v. *Woody*, 40 Cal. 69 (1964); *In Re Grady*, 39 Cal. 912 (1964)) and that the balancing done by the Court of Appeals is not sufficient to justify the infringement upon Petitioner's rights within the standards of *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should issue its Writ of Certiorari to review the decision below.

Respectfully submitted,

ROBERT J. HAFT,
JOEL JAY FINER,
Counsel for Petitioner.



APPENDIX A

Opinion of the United States Court of Appeals for the Fifth Circuit

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 23570

TIMOTHY LEARY,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(September 29, 1967.)

Before GEWIN and AINSWORTH, Circuit Judges, and LYNNE, District Judge.

AINSWORTH, Circuit Judge: This unusual criminal case delves into the new realm of psychedelic experience, and into mysticism, religion and its free exercise. The principal issue we must decide is whether the conviction of appellant for violations of federal criminal statutes relating to marihuana—a psychedelic drug which the defendant claims he uses as a religious sacramental aid—contravenes the accused's First Amendment right to the free exercise of his

religion. There are, however, other important questions, some of them constitutional also, which we will discuss fully.

Dr. Timothy Leary, appellant, and his minor daughter, Susan Leary, age 18, were jointly indicted on three counts for offenses pertaining to marihuana. Dr. Leary was tried before a jury on March 11, 1966. Count 1, which charged the smuggling of marihuana into the United States which should have been invoiced (declared), was dismissed by the court following a motion for judgment of acquittal. Dr. Leary was found guilty, however, on Count 2, which charged transportation, and facilitation of transportation, and concealment of marihuana after importation,[1] in violation of 21 U.S.C. § 176a,[2] and on Count 3, which

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[1] Count 2 of the indictment reads as follows:

> "*Count Two.* That on or about December 22, 1965, in the Laredo division of the Southern District of Texas, and within the jurisdiction of this Court, one TIMOTHY LEARY and one SUSAN LEARY, hereinafter called defendants, with intent to defraud the United States, did unlawfully and knowingly transport and facilitate the transportation and concealment of three (3) ounces of Marihuana (Cannabis Sativa), more or less, after importation, and the defendants then and there knew the said Marihuana to have been imported into the United States contrary to law, in violation of Section 176(a), Title 21, United States Code."

[2] 21 U.S.C. § 176a provides:

> "Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. * * *

charged transportation and concealment of marihuana by defendants as transferees, required to pay the transfer tax imposed by the Internal Revenue Code,[3] in violation of 26 U.S.C. § 4744(a)(2).[4] Appellant was sentenced to the maximum penalties and fines provided for such of-

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

(No suspension of sentence, probation or parole is allowed as to a conviction for this offense. See 26 U.S.C. § 7237(d).)

[3] Count 3 of the indictment reads as follows:

"Count Three. That on or about December 22, 1965, in the Laredo Division of the Southern District of Texas, and within the jurisdiction of this Court, one TIMOTHY LEARY and one SUSAN LEARY, transferees, required to pay the transfer tax imposed by the Internal Revenue Code, did unlawfully and knowingly transport, conceal and facilitate the transportation and concealment of a quantity of Marihuana, to-wit: approximately three (3) ounces of Marihuana (Cannabis Sativa) without having paid the transfer tax imposed by said code, in violation of Section 4744(a)(2), Title 26, United States Code."

[4] 26 U.S.C. § 4744(a)(2) provides:

"It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a)—

(1) to acquire or otherwise obtain any marihuana without having paid such tax, or

(2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.

"Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or [h]is delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a)."

26 U.S.C. § 7237 provides for a maximum fine of $20,000 and imprisonment of ten years for a first offense in violation of 26 U.S.C. § 4744(a)(2).

The rate of the special tax on marihuana is provided for in 26 U.S.C. § 4741. The written order form required of the transferee of marihuana is set forth in 26 U.S.C. § 4742.

fenses, subject, however, to the provisions of 18 U.S.C. § 4208(b), and was ordered committed to the medical center at Springfield, Missouri, for a complete study[5] to be

[5] 18 U.S.C. § 4208 provides in pertinent part that

> "(b) If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. * * *
>
> "(c) Upon commitment of a prisoner sentenced to imprisonment * * * the Director, under such regulations as the Attorney General may prescribe, shall cause a complete study to be made of the prisoner and shall furnish to the board of parole a summary report together with any recommendations which in his opinion would be helpful in determining the suitability of the prisoner for parole. This report may include but shall not be limited to data regarding the prisoner's previous delinquency or criminal experience, pertinent circumstances of his social background, his capabilities, his mental and physical health, and such other factors as may be considered pertinent. The board of parole may make such other investigation as it may deem necessary."

The court ordered that the sentences imposed be consecutive and the fines cumulative (amounting to a total of 30 years and $40,000). The district judge of course is awaiting the outcome of this appeal, and upon our affirmation, under the provisions of 18 U.S.C. § 4208(b) may, in his discretion, reduce the term of imprisonment or place the appellant on probation under Count 3 and reduce the sentence of imprisonment under Count 2.

However, conviction under 21 U.S.C. § 176a requires a mandatory sentence of five years, and under 26 U.S.C. § 7237 there can be no suspension of sentence or probation for such conviction.

used by the court as a basis for determining the ultimate sentence in the case. Defendant's motion for a new trial was denied.

Susan Leary was tried at the same time as her father, Dr. Leary, by the court without a jury (trial by jury having been waived) and found guilty on Count 3 of the indictment but not guilty on Counts 1 and 2. Imposition of sentence was suspended and she was placed on probation during the remainder of her minority, without supervision, under the provisions of the Youth Corrections Act, 18 U.S.C. § 5010(a). Her appeal was then dismissed on her own motion.

The facts of this case are relatively uncomplicated.

Dr. Leary left New York on December 20, 1965 by automobile, accompanied by his two children, Susan, age 18, and John, age 16, and two other persons. Their destination was Yucatan, Mexico, and the alleged purpose of the trip was a Christmas vacation for the Leary children and to provide Dr. Leary the opportunity to write a book and to prepare for a summer session to be conducted with a research group at his home in Millbrook, New York. On December 22, 1965, Dr. Leary and the four passengers drove across the international boundary at Laredo, Texas, into the Republic of Mexico, stopped at the Mexican immigration station for several minutes, and turned back toward the United States. At approximately 6:45 p.m., they arrived at the secondary inspection area, Laredo International Bridge, Laredo, Texas. Dr. Leary, the driver of the vehicle, told a U. S. Customs official that they had driven across the boundary into Mexico within the prior hour, that they had been unable to secure tourist permits and had been told by Mexican immigration officials to return the following morning at 8:00 a.m. at which time the necessary Mexican permits would be given to them. The U. S. inspector asked the group if they had anything to declare from Mexico and was told that they had not. After the occupants alighted from the vehicle, the U. S. inspector

observed some vegetable material and a seed on the floor of the automobile which appeared to him to be marihuana. Thus the five travelers were arrested. A search of the baggage, the vehicle and of the individuals was made. Sweepings from the car floor and glove compartment were later proved to be marihuana.[6] While Dr. Leary was being searched, he stated that he had never used marihuana. A woman Customs inspector performed a personal search of the two female travelers, which resulted in the finding of a small metal container on the person of Susan Leary after she had disrobed. Within the container were three partially smoked marihuana cigarettes, a small quantity of semi-refined marihuana and capsules of detroamphetamine sulfate (said to be a nonprohibitive narcotic). Demand was made of Dr. Leary for the required Treasury Department transferee form. He stated that he had no such form. Susan Leary, in response to the same demand, refused to make any statement. Dr. Leary admitted to a U.S. Customs agent that the metal box taken from his daughter, Susan, containing the marihuana, was his property. He further stated in the presence of two Government agents that he knew more about narcotics and marihuana than either of them.

Dr. Leary testified on his own behalf. He admitted that the seized marihuana had been obtained by him in New York and had been in his possession continuously on his trip from New York to Laredo; that he had neither obtained an order form nor paid a transfer tax for the marihuana as required by the statute. He said that he asked the four people in his group to get rid of the marihuana; that just prior to arriving at the U.S. Customs Station, while crossing the International Bridge, he asked if the marihuana had been disposed of and was told by Susan, his daughter, that it had not been and it was in her

[6] The indictment refers to three ounces of marihuana. Analysis and weighing of the seized material disclosed that a total of a little less than one half of an ounce had been found and confiscated.

possession. He further admitted that while on the trip from New York to Mexico at an overnight stop in New Orleans, Louisiana, he smoked marihuana to relieve a low spiritual state; that this incident was equivalent to an hour of silent meditation from which he derived spiritual benefit. Dr. Leary testified that he was familiar with the laws of the United States relative to marihuana and was aware that his actions were contrary to such laws.[7] In his testimony he attempted to justify use of this drug which he said was for religious and scientific purposes.

Dr. Leary has an impressive academic background. He testified that he received a Ph. D. degree in Clinical Psychology from the University of California. During the years from 1944 to 1960 he wrote and published several publications relative to the use of psychedelic drugs in the treatment of the mentally ill, including thirteen scientific articles and two books. In 1950 he helped found the Kaiser Psychiatric Clinic in Oakland, California. During the next eight years he received nearly one-half million dollars in federal grants at the Kaiser Clinic for research work on mental illness. He published four diagnostic tests relative to mental illness which have been used in diagnosing and treating mental patients in over 750 clinics and hospitals in the United States and which have been translated into several foreign languages. He served on the University of California medical faculty from 1953 to 1956. In 1959 he joined the Harvard University faculty.

In 1960, while visiting Mexico, he testified that he had "the most intense religious experience" he had ever had in his life as the result of having eaten a number of the "Sacred Mushrooms" of Mexico. The incident changed

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[7] Dr. Leary was questioned by the court as follows:

"The Court: I take it that you make—that you do not deny that you have recognized all the time that the transportation and the use, and so forth, of this marihuana is contrary to the laws of the United States?

"The Witness: Yes, sir. I know they are contrary to the laws of the United States."

his life. Since that time he has written five books and thirty-eight articles pertaining to religious and scientific use of psychedelic drugs, and he has devoted his life to attempting to understand the religious experience and how it can be applied to help others. He said that he formed a religious research group after returning to Harvard University, and with the help of Aldous Huxley, he experimented with certain psychedelic drugs. In 1962 he studied Hinduism and after a year became a member of a Hindu sect. In 1963 he left Harvard, performed further experimental work in Mexico, and later established a center and workshop for religious and scientific research in Millbrook, New York, which center is now his home. The building also serves as a place for religious meditation and spiritual retreat. Rooms in the house contain shrines devoted to Hindu, Buddhist and Christian ways of finding God, as well as religious pictures and statues. Dr. Leary has traveled extensively through Asia in pursuit of his religious endeavors and has studied Buddhism and Hinduism with several religious teachers and monks. While studying in India with Sri Asoke Fukir, a religious leader, Dr. Leary participated in religious rituals in which marihuana was used. He was converted to Hinduism, and is now a member of the Brahmakrishna sect in Massachusetts.

Dr. Leary further testified that he first used marihuana in August or September 1964. Marihuana enables him to attain what he describes as the third level of consciousness. Other psychedelic drugs take a person to a higher level. According to the Hindu religion, there are thousands of roads to illumination to the god within a person. Different sects specialize in different aids. The Hindu sect in India of which he became a member uses marihuana for religious illumination and meditation. He ordinarily uses marihuana less than once a week and then only for religious purposes. He draws no distinction between his religious beliefs and his scientific experimentation. If he could not use marihuana it would not affect his religious beliefs but he would

consider it a violation of those beliefs and practices if he were denied its use.

Dr. Leary said he acquired the marihuana in New York which led to his conviction. He testified that the reason he did not declare the marihuana at the U.S. Customs Office at Laredo was his apprehension of being subjected to investigation or arrest. He never complied with the Treasury Department regulations relative to marihuana because he knew that he could not obtain permission for its use inasmuch as his research is not performed in a laboratory and is of a religious nature; that the law makes no provision for the use of marihuana under such circumstances; that if he had attempted to register or to pay the required tax, the marihuana would have been taken from him and he would have been subjected to legal action. He had applied for and been refused permits for other chemicals such as mescaline, peyote and LSD. He believes he has both a moral and a political right to possess marihuana.

Fred Swain (Sri Kalidas, in religion) testified on behalf of appellant. He is an American Hindu Sanyasa (monk), a renunciant, living in a monastery, who joined the religious order of which appellant is a member in 1948. He met Dr. Leary in 1962 and later participated in psychedelic experiments with him at Harvard University. While traveling in India he was often in the company of Dr. Leary; he smoked marihuana with him in the Rishikesh, a city of holy men, along the banks of the Ganges River, in Hindu religious services. He said that marihuana plays a very important part in the rituals of the Hindu sect conducted by Sri Asoke Fukir in India. The Brahmakrishma sect in the United States of which he and Dr. Leary are members is a highly established authority sect in India, recognized throughout India by all Hindus. He admitted that he was partially able to achieve and practice his religious beliefs in the Hindu sect without the use of marihuana. He does not use marihuana in the United States because it is unavailable; he is forced to use other psychedelic drugs in conjunction with meditation and prayer.

Dr. Ralph Metzner, a psychopharmacologist who received his Master's degree from Oxford and Ph. D. in Psychology from Harvard, testified on behalf of appellant. He co-authored with Dr. Leary the book "Psychedelic Experience" as well as several articles including "Reducing Criminal Behavior" by the use of the psychedelic drug psilocybin (the extract of the sacred mushroom). The word "psychedelic" refers to a class of drugs, which includes LSD, mescaline, marihuana, among others, whose primary effect is to expand consciousness, heighten intellectual activity and sensory awareness. In India he was initiated into the same Hindu sect of which Dr. Leary is a member. He participated with Dr. Leary in several scientific experiments under the auspices of Harvard University. He also assisted Dr. Leary in conducting seminars, giving lectures, writing books and giving training courses in consciousness expansion without drugs. He corroborated Dr. Leary's testimony concerning the religious nature and character of the Millbrook center in New York.[8]

Appellant's points of error are stated substantially as follows:

1 (A). The District Court erred in refusing to instruct the jury to acquit appellant if it found his religious claims to be honest and in good faith.

1 (B). In light of the federal exemption from restrictive legislation granted to religious users of peyote and the Government's inability to establish that marihuana is more harmful than peyote, the denial of a religious exemption from the marihuana legislation is an invidious religious discrimination in violation of the First and Fifth Amendments.

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[8] Out of the presence of the jury Dr. Metzner testified at length that marihuana was a mild, relatively harmless and non-addictive drug. Dr. Joe Fort, medical doctor with special training in psychiatry and drug addiction, also testified out of the presence of the jury substantially to the same effect.

2. Denial of appellant's motions for a bill of particulars specifying the location, direction and time of alleged transportation was reversible error; alternatively, the indictment was fatally insufficient.

3. The District Court's instructions on the meaning of the statutory presumptions (a) effectively directing conviction and imposed upon appellant the burden of proving his innocence; (b) were misleading and authorized convictions if appellant did not prove to the jury's "satisfaction" that his possession was "lawful" and "legitimate"; and (c) failed to direct acquittal if the jury believed that appellant lacked knowledge of illegal importation—all in violation of the Fifth and Sixth Amendments and amounting to "plain error" under Rule 52(b), Fed. R. Crim. P.

4. The Government's closing argument to the jury far exceeded the bounds of fair comment.

5. The Government's failure to disclose that one of the major witnesses was under two federal indictments at the time of the trial denied appellant a fair trial.

6. The presumption under 21 U.S.C. § 176a that marihuana is illegally imported and that a possessor has knowledge of illegal importation is arbitrary and irrational in view of the high proportion of marihuana in the United States which is domestically grown.

7. The statutory requirement of a written order form (26 U.S.C. § 4742) and the imposition of a transfer tax (26 U.S.C. § 4741(a)) violate appellant's constitutional privilege against compulsory self-incrimination and render invalid the conviction under Count 3.

8. The District Court erred in refusing to instruct the jury that they could consider as a defense to Count 2, the defendant's honest and sincere belief that he had a right to

engage in his activities because of his religious, scientific, or parental beliefs, and that these beliefs could negate the specific intent necessary for conviction under the statute.

Religious freedom, guaranteed by the Constitution, must be weighed with the public interest and the broad power to legislate vested in Congress by the Constitution.[9] Thus the First Amendment "embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." *Cantwell v. State of Connecticut*, 310 U. S. 296 (at 303, 304), 60 S. Ct. 900, 84 L. Ed. 1213 (1940). The freedom to act is conditional and relative and Congress may prescribe and enforce certain conditions to control conduct which may be contrary to a person's religious beliefs in the interest of the public welfare and protection of society. See the Supreme Court's decisions in the anti-bigamy cases, *Reynolds v. United States*, 98 U. S. 145, 25 L. Ed. 244 (1878); *Davis v. Beason*, 133 U.S. 333, 10 S. Ct. 299, 33 L. Ed. 637 (1890), and the Sunday-closing-law cases, *McGowan v. State of Maryland*, 366 U. S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961); *Two Guys From Harrison-Allentown v. McGinley*, 366 U. S. 582, 81 S. Ct. 1135, 6 L. Ed. 2d 551 (1961); *Braunfeld v. Brown*, 366 U. S. 599, 81 S. Ct. 1144, 6 L. Ed. 2d 563 (1961); *Gallagher v. Crown Kosher Super Mkt. of Mass.*, 366 U. S. 617, 81 S. Ct. 1122, 6 L. Ed. 2d 536 (1961).

In *Reynolds v. United States, supra*, 98 U. S. at 166, the Supreme Court, in denying Mormons an exemption from anti-bigamy laws, said, "Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." The Court recognized that religious practice could not be accepted as justification for an overt criminal act; that to permit a man to excuse his unlawful practices

[9] See Art. I, Sec. 8, United States Constitution; Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development, Part I. The Religious Liberty Guarantee*, 80 Harv. L. Rev. 1381 at 1390 (1967).

because of his religious belief "would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." (98 U. S. at 167.)

In *Braunfeld* v. *Brown, supra,* which upheld the constitutional validity of a Pennsylvania Sunday-closing statute, the Court reaffirmed the principles of *Cantwell* v. *State of Connecticut, supra,* and *Reynolds* v. *United States, supra,* with its statement that "the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions" (366 U. S. at 603), and that "legislative power over mere opinion is forbidden but it may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion." (366 U. S. at 603, 604.)[10]

Congress has seen fit to legislate, with appropriate criminal sanctions, concerning the possession, importation, concealment, and taxation of marihuana. The severity of the penalties provided by statute for the violation of these laws provides an insight into the grave concern of Congress to control the use of this drug. The testimony of appellant's witnesses relative to his sincerity of purpose in his religious and scientific endeavors is not pertinent here; nor is the evidence about the so-called harmless nature, the therapeutic value, and the accepted use of marihuana for religious rituals by certain sects in India.

Our concern is with the laws of the United States, which appellant admittedly, knowingly and purposely violated because they conflicted with his personal religious beliefs and practices. Appellant has attempted to demon-

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[10] See also *Davis v. Beason,* 133 U. S. 333, 342-343, 10 S. Ct. 299, 33 L. Ed. 637 (1890), in which the Supreme Court said: "However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation."

strate that the experience he finds through the use of marihuana is the essence of his religion. We do not inquire into the truth or verity of appellant's religious beliefs—to do so would be violative of the Free Exercise Clause of the First Amendment. *United States* v. *Ballard*, 322 U. S. 78, 64 S. Ct. 882, 88 L. Ed. 1148 (1944). But appellant's religious creed and the sincerity of his beliefs are not at issue here. The district judge properly refused an instruction to the jury that they should acquit the defendant if they found his religious practices were in good faith.

Appellant's reliance on *Sherbert* v. *Verner*, 374 U. S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963), for authority that the constitutionally guaranteed right of free religious exercise imposes on the Government the burden of showing a compelling interest in its abridgement, is misplaced and inapposite on the facts. In *Sherbert* the Supreme Court held that the disqualification of a member of the Seventh Day Adventist Church for unemployment benefits under the South Carolina Unemployment Compensation Act, because of her refusal to work on Saturday, imposed a burden on the free exercise of her religion. The Court in arriving at its conclusion considered whether there was "some compelling state interest" in the statute which justified "the substantial infringement of appellant's First Amendment right" (374 U. S. at 406), and found no such state interest.

Here the paramount Government interest in the enforcement of the laws relative to marihuana is the protection of society. We cannot reasonably equate deliberate violation of federal marihuana laws with the refusal of an individual to work on her Sabbath Day and nevertheless claim compensation benefits. The Court in *Sherbert*, while upholding the Free Exercise Clause under the facts of that case, recognized that it had rejected challenges under the same clause "to governmental regulation of certain overt acts prompted by religious beliefs or principles, for 'even

when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions.' Braunfeld v. Brown, 366 U. S. 599, 603, 81 S. Ct. 1144, 1146, 6 L. Ed. 2d 563. The conduct or action so regulated have invariably posed some substantial threat to public safety, peace or order. See, e.g., Reynolds v. United States, 98 U. S. 145, 25 L. Ed. 244; Jacobson v. Massachusetts, 197 U. S. 11, 25 S. Ct. 358, 49 L. Ed. 643; Prince v. Massachusetts, 321 U. S. 158, 64 S. Ct. 438, 88 L. Ed. 645; Cleveland v. United States, 329 U. S. 14, 67 S. Ct. 13, 91 L. Ed. 12." (374 U. S. at 403.)

The unlawful transportation, possession and use of marihuana falls within the category of cases cited in *Sherbert* which require governmental regulation. "Crime is not the less odious because sanctioned by what any particular sect may designate as 'religion.'" *Davis* v. *Beason*, 133 U. S. 333, 345, 10 S. Ct. 299, 33 L. Ed. 637 (1890).

There is no evidence in this case that the use of marihuana is a formal requisite of the practice of Hinduism, the religion which Dr. Leary professes. At most, the evidence shows that it is considered by some as being an aid to attain consciousness expansion by which an individual can more easily meditate or commune with his god. Even as such an aid, it is not used by Hindus universally.

Congress has made it a crime to traffic in marihuana and it was not incumbent upon the Government to produce evidence to controvert the testimony of witnesses on the controversial question whether use of the drug is relatively harmless. Thus the question is whether the conduct or action so regulated and prohibited under severe criminal penalties by Congress (i.e., trafficking in marihuana) has posed "some substantial threat to public safety, peace or order," *Sherbert, supra*, 374 U. S. at 403. Congress has demonstrated beyond doubt that it believes marihuana is an evil in American Society and a serious threat to its people. It would be difficult to imagine the harm which

would result if the criminal statutes against marihuana were nullified as to those who claim the right to possess and traffic in this drug for religious purposes. For all practical purposes the anti-marihuana laws would be meaningless, and enforcement impossible. The danger is too great, especially to the youth of the nation, at a time when psychedelic experience, "turn on," is the "in" thing to so many, for this court to yield to the argument that the use of marihuana for so-called religious purposes should be permitted under the Free Exercise Clause. We will not, therefore, subscribe to the dangerous doctrine that the free exercise of religion accords an unlimited freedom to violate the laws of the land relative to marihuana.

Appellant argues that the religious use of peyote, a psychedelic hallucinogen, by Indians who are members of the Native American Church has been constitutionally protected by the Supreme Court of California in *People* v. *Woody,* 40 Cal. 69, 394 P. 2d 813 (1964). He refers also to the California Supreme Court's decision in *In Re Grady,* 39 Cal. 912, 394 P. 2d 728 (1964), decided the same day as *Woody,* in which conviction of a "self-styled peyote preacher" for unlawful possession of narcotics, namely, peyote, was annulled and a new trial granted in order that the defendant might have an opportunity to prove that his use of peyote was in connection with an honest and bona fide practice of a religious belief. By parity of reasoning he contends that marihuana, another psychedelic drug, is entitled to the same constitutional protection as peyote. With due deference to the California Supreme Court, we are of course not bound by its decisions. However, we note an essential difference between *Woody* and the instant matter in that peyote in the *Woody* case played "a central role in the ceremony and practice of the Native American Church, a religious organization of Indians," and that the "ceremony marked by the sacramental use of peyote, composes the cornerstone of the peyote religion." Grady was apparently the spiritual leader of a group of

individuals and provided peyote for the group which he said was for religious purposes.

We are not impressed that the California cases are directly in point, and we will not apply them insofar as the circumstances of this case are concerned.[11]

In the early case of *State* v. *Big Sheep*, 243 Pac. 1067 (1926), the Montana Supreme Court held, "It was clearly within the power of the Legislature to determine whether the practice of using peyote is inconsistent with the good order, peace, and safety of the state," against the contention that the defendant's religious freedom was infringed.

In *State* v. *Bullard*, 267 N. C. 599, 148 S. E. 2d 565, 569 (1966), the North Carolina Supreme Court held, "The defendant may believe what he will as to peyote and marijuana and he may conceive that one is necessary and the other is advisable in connection with his religion. But it is not a violation of his constitutional rights to forbid him, in the guise of his religion, to possess a drug which will produce hallucinatory symptoms similar to those produced in cases of schizophrenia, dementia praecox, or paranoia, and his position cannot be sustained here—in law nor in morals."

The District Court denied appellant's request for a bill of particulars which sought information to ascertain whether it was the Government's intention to rely on his possession of marihuana prior to entry into Mexico or following importation into the United States from Mexico, and whether it was the Government's contention that he was guilty of the overt act of smuggling. The smuggling

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[11] The Federal Commissioner of Food and Drugs has exempted peyote from use in bona fide religious ceremonies of the Native American Church. 21 C.F.R., Part 166.3(c). But this would hardly justify our holding, as appellant contends, that the criminal statutes against marihuana are unconstitutional because of religious discrimination. The exemption accorded the use of peyote in the limited bona fide religious ceremonies of the relatively small, unknown Native American Church is clearly distinguishable from the private and personal use of marihuana by any person who claims he is using it as a religious practice.

count was withdrawn from the jury by the court so we turn our attention to Count 2, which charges appellant with transportation and concealment of marihuana after knowledge of importation, and Count 3, which charges transportation and concealment without having paid the necessary transfer tax. Appellant stated that the information requested was necessary to prepare an adequate defense and to avoid the possibility of double jeopardy. Appellant further contended that depending on the theory of the prosecution, different legal defenses would arise, and the requested information was necessary to decide whether he should exercise his right to testify. From a reading of Counts 2 and 3 we conclude that they are not duplicitous. Each count states the date and the place of the offense and adequately apprises appellant of the nature of the offense charged. Granting or denial of a bill of particulars is a matter within the sound discretion of the trial judge, and will not be interfered with on appeal unless there is abuse or prejudice. *Joseph* v. *United States*, 5 Cir., 1965, 343 F. 2d 755; *Robertson* v. *United States*, 5 Cir., 1959, 263 F. 2d 872; *Johnson* v. *United States*, 5 Cir., 1953, 207 F. 2d 314. There was no such abuse or prejudice here.

Appellant contends, alternatively, that the indictment in this case is fatally insufficient. In this Circuit's decisions in *Thomas* v. *United States*, 314 F. 2d 936 (1963), and *Marquez-Anaya* v. *United States*, 319 F. 2d 610 (1963), the defendants were charged with smuggling marihuana and with transportation of the drug without having paid the necessary tax thereon. Proof was adduced by the Government that the marihuana had been obtained by the defendants in Mexico. The court held in *Thomas*, and reiterated in *Marquez-Anaya*, that an indictment charging transportation and concealment of marihuana without having paid the transfer tax was necessarily predicated upon the defendants having obtained the drug within the United States, and because of the Government's proof to the

contrary, that is, that the marihuana had been smuggled by the defendants into the United States from Mexico, the conviction under the tax count could not stand. However, the instant matter is clearly distinguishable from our holdings in *Thomas* and *Marquez-Anaya*. Here, as the case developed, the Government's evidence (through testimony of United States Customs Agent Hatch of statements made to him by the accused) showed that the marihuana was acquired by defendant in the United States. Dr. Leary's own testimony later in the trial was to the same effect and the district judge consequently withdrew the smuggling count from the jury's consideration. The defendant admitted all of the elements of Count 2 except knowledge of importation. The Government, supported by appellant's own testimony, proved the elements of transportation and concealment of the drug under Count 2, although under the statute it was incumbent on it merely to show possession in order to authorize conviction unless the defendant explained his possession to the satisfaction of the jury. Appellant admitted transporting the marihuana from New York and crossing and recrossing the international border between the United States and Mexico with the marihuana in his possession. He made no effort to explain his possession of the illegal drug to the jury beyond his defense that use of marihuana was a sacramental aid in the practice of his religion—an explanation we have already pointed out is insufficient and immaterial. In addition to the facts proved by the Government, conviction on Count 3 was also justified by appellant's own testimony—his candid admission that he had never paid the required tax as a transferee. The counts were, therefore, neither inconsistent within themselves nor with each other.

There is likewise no merit to appellant's argument that the court's instructions implied that possession, not satisfactorily explained, *compelled* conviction. The court assiduously avoided such an instruction. At the outset the trial judge explained the presumption of innocence which at-

taches to every defendant brought to trial in a criminal case. He instructed the jury that the Government must prove the accused's guilt beyond a reasonable doubt and defined that term. The district judge quoted the exact provision of the statutory inference in 21 U.S.C. § 176a, i.e., "such possession shall be deemed sufficient evidence as to *authorize* conviction unless the defendant explains his possession to the satisfaction of the jury," (emphasis added), and explained its meaning in the language of the statute by stating: "That means, unless he proves to your satisfaction that it was a lawful and a legitimate possession of the marihuana he had." The court clearly and adequately defined the terms "unlawfully," "knowingly," and "with intent to defraud" and twice repeated the necessity of the jury finding such elements beyond a reasonable doubt to warrant conviction. The jury was advised of its affirmative duty to acquit in the absence of such findings. We do not construe the court's instructions as *requiring* conviction on evidence of possession of marihuana, but only as *authorizing it.*[12] Appellant's argument is, therefore, untenable,

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[12] Pertinent parts of the judge's instructions to the jury on this question are quoted as follows:

> "Now, I instruct you, ladies and gentlemen, that this defendant, as is true of every defendant brought to trial in this court, is presumed at the outset to be innocent.
>
> "The defendant starts off with a clean slate, and by pleading 'Not Guilty,' as he has done here, has imposed upon the Government to prove his guilt to you beyond a reasonable doubt.
>
> "By the term 'reasonable doubt' as I use it here, is meant such a doubt as may arise in your minds when, after fully and impartially considering all of the evidence, the jurors do not feel satisfied to a moral certainty of the accused's guilt.
>
> "A 'reasonable doubt' does not mean a mere possible or imaginary doubt or a mere conjecture; a 'reasonable doubt' is one which appeals to and is based upon your reason.
>
> "If after fully and impartially considering all of the evidence you have a reasonable doubt as to the guilt of the defendant, it's your duty to acquit.

especially since he did in fact testify that he knew that his actions were contrary to the laws of the United States.

"On the other hand, if after fully and impartially considering all of the evidence you are convinced beyond a reasonable doubt of the guilt, then it's your duty to convict." (R. 591, 592.)

* * *

"Now, I want to read the statutes to you which the defendant is alleged to have violated.

"Section 176(a) of Title 21 of the United States Code, in pertinent part, reads as follows:

"Notwithstanding any other provision of law, whoever knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced—

"Now, that has to do with Count 1, which I am withdrawing from your consideration.

". . . or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, shall be punished as the statute thereafter provides.

"With the further paragraph:

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had marihuana in his possession, such possession shall be deemed sufficient evidence as to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

"What that means, of course, is this:

"If the defendant be shown to have had the marihuana in his possession in the United States, such possession shall be deemed sufficient evidence to authorize conviction unless he explains his possession to the satisfaction of the jury. That means, unless he proves to your satisfaction that it was a lawful and a legitimate possession of the marihuana which he had.

"The other statute alleged to have been violated is 4744(a)(2) of Title 26 of the Code, reading in pertinent part as follows:

"It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by Section 4744(a)(1) to acquire or otherwise obtain any marihuana without having

Appellant contends that the closing arguments to the jury by Government counsel far exceeded the bounds of fair comment, invited prejudice based on educational, eco-

paid such tax or, to—and this is the part that we are interested in—to transport or conceal or in any manner facilitate the transportation or concealment of any marihuana so acquired or obtained. Proof that any person shall have in his possession any marihuana and shall have failed after reasonable notice and demand by the Secretary or his delegate to produce the order form required by Section 4742 to be retained by him, shall be presumptive evidence of guilt under this subsection." (R. 595-598.)

* * *

"And the statute which I have read to you with regard to this third count provides that failure to produce the order form shall be presumptive evidence of guilt under this subsection.

"Now, you might have some difficulty with the question on Count 2 by reason of the fact that the statute requires that the defendant receive—by reason of the fact that the statute provides that one who receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of such marihuana, after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, shall be punished as the statute provides.

"The Government is entitled to rely upon the presumption which I read to you earlier; that is, whenever on trial for a violation of this sub-section the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains his possession to the satisfaction of the jury.

"I mention this a second time because you might be confused about the question of importation.

"We are not talking necessarily about the importation or what the Government contends was importation here at the bridge.

"The defendant has told us that he received the marihuana in New York. This statute, of course, is of application throughout the land and the presumption would still apply that the narcotic had been imported illegally and that he knew it had been imported illegally unless he explains his possession to the satisfaction of the jury." (R. 608-610.)

nomic and regional differences between the accused and the jurors, expressed strong hostility toward him, asserted that he was irresponsible regarding his child's welfare, attacked him for offering a religious defense, bolstered a witness' credibility and generally inflamed the jury's emotions, amounting to plain and reversible error. Pertinent parts of the arguments to which objections were made are set forth more fully in the margin below,[18] but they refer

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[18] The following is taken from the final argument of Government counsel to the jury:

> "And all this other stuff, I submit, is just hogwash. It's just an attempt to come down here to Laredo, Texas and get a federal jury to believe that because he has got a Ph. D and because he has got a 3,000-acre mansion in Upper New York where they experiment all the time, that he is not subject to the laws of the United States of America.
>
> "And I say to you respectfully and sincerely that it not but hogwash, that Dr. Leary, like everybody else, high, low, black, white—any color—are subject to the laws equally, of the United States. That is one thing that we have that many people in the world do not have. We have a country of law. We are governed by law and we all are subject to the same rules, rich, poor, race, creed or color—makes no difference. The law applies equally to everyone, to all citizens. And that is one great thing about our country." (R. 545, 546.)
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> * * *
>
> "But after hearing this testimony for several days I don't think there can be any serious question about the fact that this business about psychedelics is not in the encyclopedias and it appears that there has nothing ever been written in print about it except things that he was connected with. This is a hoax and we respectfully submit that they tried to come down here and put off on a good jury of Laredo people a colossal hoax." (R. 551.)
>
> * * *
>
> "To say that this was an unusual case would be a gross understatement, and to say that it's an important case would be a gross understatement, because, ladies and gentlemen, I have participated in what I feel is a considerable number of criminal cases and I cannot remember a case that I have felt more strongly about than I have this case, and I will tell you why:" (R. 578.)
>
> * * *

principally to the prosecutor's statements that appellant was "irresponsible" (especially with reference to the welfare of his children), his defense was a "colossal hoax," "just hogwash," to Government counsel's statement that "I cannot remember a case I have felt more strongly about than I have this case," and his further statement that "I don't mean to shout, for shouting's sake, but I feel so strongly about this case and his acts that I can't help myself."

The only semblance of an objection made by defense counsel was that related to Government counsel's reference to defendant's alleged irresponsibility in raising his children. Government counsel stated:

> "What kind of a man are you dealing with? What kind of a man do you have before you here today?
>
> "You have a man that says, 'I believe in bringing up my children the old-fashioned way,' and the 'old-fashioned way' ladies and gentlemen, is to expose them to marihuana, expose them to these other drugs that he has no right to dispense. And that is what we have here.
>
> "Is that irresponsibility?
>
> "I can think of no—no other situation that it can be more irresponsible.
>
> "Mr. Fitzgibbon: If your Honor please. I thought on the question of religion we weren't going to talk on it.
>
> "The Court: Religion?
>
> "Mr. Fitzgibbon: The right to bring up our children." (R. 581, 582.)

The matter was not further pursued by Mr. Fitzgibbon, defense counsel.

Government counsel also stated:

> "But what does he do when he is finally exposed and they find out about it?
>
> "He makes a joke about it. Now, I don't mean to shout, for shouting's sake, but I feel so strongly about this case and his acts that I can't help myself, and I hope that you will forgive me." (R. 585, 586.)

No error is seen in the reference in argument of government counsel to the witness, Cutler, that "there is no reason to disbelieve this man—no motivation for him to falsify or no bad feelings toward Dr. Leary." We discuss the credibility of Cutler and the attempt to impeach him later in this opinion.

The record discloses that no objection to the remarks of the prosecution was made by the several defense counsel either during or after the argument. The issue was, therefore, waived at the time of trial by the defense. See *Fogarty* v. *United States*, 5 Cir., 1959, 263 F. 2d 201, cert. den. 360 U.S. 919, 79 S. Ct. 1437, 3 L. Ed. 2d 1534; *Van Nattan* v. *United States*, 10 Cir., 1966, 357 F. 2d 161; *United States* v. *Sawyer*, 4 Cir., 1965, 347 F. 2d 372; *United States* v. *Aadal*, 2 Cir., 1966, 368 F. 2d 962.

Judging the case from the viewpoint that most of the evidence which incriminated the accused was admitted and confirmed by him, some resort to emphatic and forceful expression by Government counsel was to be expected. Though the court declined to give the specific charge to the jury requested by appellant that it should acquit appellant if it found his religious claims to be honest and in good faith, it nevertheless permitted Dr. Leary to present his claims fully with reference to his religious and scientific beliefs and to support them with corroborating witnesses. The sincerity of the accused was undoubtedly at issue, and especially his credibility with reference to the possession of marihuana while the defendant was crossing the international border at Laredo. We discern no personal hostility by the prosecution toward the defendant. Though Government counsel's summation of the case at times was strong, a fair reading of the entire argument, taken with the strong evidence of the defendant's guilt largely shown by his own admissions, does not convince us that there was plain error or abuse which affected defendant's substantial right to a fair trial or would justify reversal. Fed. R. Crim. P., Rule 52. That the defendant's teenage daughter was exposed to a home where the free use of marihuana by the family and inhabitants of the household (said to be for religious and scientific purposes) was regular, even routine—but nevertheless in violation of the laws of the country—also permitted the prosecutor more leeway in final argument than might be expected under ordinary circum-

stances, and we are unable to say that zeal overcame fairness.[14]

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[14] The following excerpt from the testimony while Dr. Leary was being interrogated by his counsel (Mr. Fitzgibbon) rather clearly indicates the common use of marihuana in the home and by the family of Dr. Leary:

"Q (By Mr. Fitzgibbon) Now, at home in Millbrook you stated that you used marihuana in the practice of your religion.

Do members of your family share this practice and belief with you? A You mean do they smoke marihuana?

"Q Yes.

"The Court: Is that what you are asking him?

"Mr. Fitzgibbon: No, sir. If your Honor please—strike that.

"Q (By Mr. Fitzgibbon) I just have one question about your family here.

Does marihuana play an integral part in your family life in the bringing up of your children—in the raising of your children?

Just answer that yes or no. A. Well, the use of psychedelic drugs does.

* * *

"The Court: Well, I believe he may explain. He is apparently having some difficulty making a categorical answer.

"A (Continuing) You see, I can't explain why it's difficult for me to answer because—

"The Court: I think counsel is interested in the part marihuana plays in your family life.

Is that what you are asking him?

"Mr. Fitzgibbon: Yes, your Honor.

"The Court: You may tell us if you wish.

"Q (By Mr. Fitzgibbon) We have discussed the science, we have discussed the religion and we have discussed the family.

Now, the family life— A Well, I would like to try to make —use two or three sentences to do this, because I am talking about a period of over six years in which the use of marihuana has been somewhat recent.

"Q Yes, sir. A Since 1960, since I started working through these experiences, most of the experiences that I was involved in were in my own home. The door of my home has never been locked and no room in my home has ever been locked. Hundreds and hundreds of psychedelic planned drug sessions have been run in my home. My children have always lived with me in my home.

Defense counsel attempted to impeach a Government witness, Cutler, who testified on direct examination that he

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From the very beginning of this work I felt that this was a natural, personal, if you will, sacred experience that was not to be secret or behind doors. I couldn't bring—I had to have this—my children be open to this, to see what was going on. My children have walked in the room during perhaps hundreds of psychedelic drug sessions with religious leaders and with philosophers and so forth, in my home.

When we were in Mexico on two occasions, we were doing research with primitive people. My children were with me. So that the use of psychedelic drugs is—and the discussion and the debates about how to use them—this is going on 24 hours a day in my home, so that the integral, central, almost exclusive part of our home life is centered on these spiritual and psychological activities.

"The Court: If I understand you, then, your children have observed and seen what is going on but have not participated? Is that a fair statement?

"The Witness: Yes, sir.

And I also wanted to make the point that marihuana was of a more recent addition and played a minor, but real part, in the last year.

"Q (By Mr. Fitzgibbon) you then think it's an important part of your role as a father to expose, I might say—use the term 'expose' your children to these scientific, psychedelic experiences? A. Yes, sir.

"Q . . . And let them see how religion is carried on in their home? A. Not just religion. It's a way of life. I am very old fashioned about bringing up children. I think that it's the home that determines the child, that the idea of sending your child out to some strangers to be educated—I believe the child should learn his father's trade, if possible or if he wants to, and that he should learn—both the religious and the philosophic and the way of life of his parents so that—

"Q Well, do you believe, then, that every person should have a right to raise their children as they believe? A I think that is one of the inalienable rights, not only of our Government but a God-given right to raise your children as best your conscience and your ignorance or wisdom has led you to believe.

"Q The way that you are raising your children at the present time, do you believe that you are raising them according to your beliefs, that you have a right to do so? A I do." (R. 305-309).

had attended a social gathering at Greenwich Village; that Dr. Leary had smoked marihuana at this party, which event occurred prior to the time which Dr. Leary admitted first using the drug. On cross-examination, counsel for the defense asked the witness, "How may times have you been picked up for smoking marihuana?" The question was an attempt to establish a criminal record of the witness and admittedly was asked to impeach his credibility.[15] The court properly sustained Government counsel's objection. Generally, only prior convictions of felonies or of misdemeanors involving moral turpitude are admissible in evidence for the purpose of impeachment of the credibility of a witness. *Roberson* v. *United States,* 5 Cir., 1957, 249 F. 2d 737; *Ramirez* v. *United States,* 9 Cir., 1961, 294 F. 2d 277; *Homan* v. *United States,* 8 Cir. 1960, 279 F. 2d 767, cert. den. 364 U.S. 866, 81 S. Ct. 110, 5 L. Ed. 2d 88 (1960); *Beasley* v. *United States,* D.C. Cir., 1954, 218 F. 2d 366, cert. den. 349 U.S. 907, 75 S. Ct. 584, 99 L. Ed. 1243 (1955);

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[15] The record reveals the cross-examination by Mr. Fitzgibbon for the defense of the witness, Cutler, on this issue as follows:

"And, of course, you were paid by the Government to come down here, were you not? A I wasn't paid by the Government to come down here. My expenses were paid, yes.

"Q Well, it's somewhat of an equivocation. Your expenses were paid to come down? A Yes. But I am receiving no salary or anything like that.

"Q You receive a certain amount of money per day, do you not? A Yes. I believe so.

"Q So you are being paid, then?

Now, what—how many times have you been picked up for smoking marihuana?

"Mr. Susman: We object to that, your Honor.

"The Court: Are you undertaking to impeach the credibility of the witness? If you are, you may prove it by a prior conviction of felony.

"Mr. Fitzgibbon: Yes, your Honor.

"Q (By Mr. Fitzgibbon) Have you been convicted of a felony in this state or any other state? A No. I have not.

"Q You have not?

"Mr. Fitzgibbon: Pass the witness." (R. 461, 462.)

United States v. *Bell*, 6 Cir., 1965, 351 F. 2d 868. The trial court has wide discretion to limit cross-examination, *Roberson* v. *United States, supra,* and the exercise of such discretion should not be interfered with in the absence of a showing of prejudice to the defendant. *Alderman* v. *United States,* 5 Cir., 1929, 31 F. 2d 499; *Foster* v. *United States,* 10 Cir., 1960, 282 F. 2d 222. We ascribe no prejudice to the court's ruling. The jury was free to accept or reject the witness' testimony on this peripheral issue and was so instructed by the court. Cutler was not a major witness, though he was used by the prosecution on rebuttal to impeach Dr. Leary's testimony as to when he first began using marihuana. It is most unlikely that Cutler's statement had any substantial effect on the verdict in view of the defendant's own tsetimony that he frequently used marihuana, knowing it to be illegal, even if such use was purportedly for scientific or religious purposes.

Now, for the first time, on appeal, appellant states that Cutler was, at the time of trial when he testified, under indictment in the United States Court, Southern District of California, for smuggling marihuana into the United States from Mexico, and for bail jumping in connection with this charge; that this fact was known to the Government and not disclosed to Dr. Leary's counsel. The Government's answer is that Cutler had no prior convictions, had not been tried as yet on the California federal cases, and that if defense counsel had asked for this information it would have been given. We observe that the pending charges against Cutler are in no way connected with the present case, and that no attempt was made by counsel at the trial to go into any relationship between the witness and the prosecution which might have reflected on his credibility, except to show that the Government paid his expenses to come to Laredo to testify. There was obviously no suppression by the Government of Cutler's criminal record for there were no convictions against him when he testified, nor did the pending cases in California relate in any way to the present prosecution. The contention is without merit.

Appellant contends that the presumption under 21 U.S.C. § 176a, that marihuana is illegally imported and that a possessor has knowledge of illegal importation, is arbitrary and irrational in view of his contention that a high proportion of marihuana in the United States is domestically grown. To prove his point he has compiled certain statistics in published annual reports of the Bureau of Narcotics, 1957-1964, inclusive. This proof was not offered at the trial of the case and we assume we are asked to take judicial cognizance of information found in these public reports. By process of reasoning, appellant's counsel states that of all the marihuana in the United States well over 99 per cent has been domestically grown. Of course, the Bureau of Narcotics reports make no such statement and we are not impressed that it is correct. Obviously the information found in appellant's brief is incomplete for undoubtedly much marihuana from outside the United States does reach this country. Appellant does not purport to tell us what this amount is or to estimate it beyond his own rationalization of certain statistics he has assembled from published reports. No reference is made to seizures by state authorities nor is any provision suggested for the amount of marihuana which comes into the United States undetected. In other published reports which are equally available to the Court as are the Bureau of Narcotics annual reports relied on by appellant, United States Commissioner of Narcotics, Henry L. Giordano, testified before the House of Representatives Subcommittee of the Committee on Appropriations, on February 8, 1967, that "most of our marihuana comes from Mexico."[16] This official statement, which is in direct

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[16] See Extracts from Treasury-Post Office Departments and Executive Office Appropriations for 1968, Hearings before a Subcommittee of the Committee on Appropriations, House of Representatives, 90th Cong., 1st Sess., p. 457, testimony of Mr. Giordano: "One of the problems, of course, is that most of our marihuana comes from Mexico. It is quite easy to smuggle it across the border and distribute it."

contradiction to the conclusions in exhibits prepared by appellant's counsel, shows rather well that appellant's information, submitted for the first time on brief, and not the subject of proof contradictorily at trial, is neither complete nor convincing.

In *Caudillo* v. *United States*, 9 Cir., 1958, 253 F. 2d 513, the Ninth Circuit upheld the constitutionality of the presumption in 21 U.S.C. § 176a, that marihuana is illegally imported and the possessor has knowledge of importation.[17] The court noted the necessity under the requirements of *Tot* v. *United States*, 319 U. S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943), of rational connection between the facts proved and the ultimate fact presumed, and said:

> "Though there might be differences of opinion, it can reasonably be argued that the facts of marihuana importation are so well-known, particularly to marihuana users, that there is a 'rational connection between the fact proved and the ultimate fact presumed.'"

The Ninth Circuit in *Caudillo* also pointed out, "The statutory language in question has long existed in the narcotic laws" and was upheld by the Supreme Court

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See also statement of Mr. Giordano, United States Commissioner of Narcotics at Hearings of the Special Senate Subcommittee on Narcotics of the Committee on the Judiciary, June 14, 1966, relative to the Narcotic Rehabilitation Act of 1966, in pertinent part as follows: "Large quantities of marihuana grown illicitly in Mexico are smuggled across the border into the United States. Although marihuana grown in the United States is occasionally found in the traffic, the Mexican variety, preferred by users, is most prevalent in the United States marihuana traffic."

[17] See also *Borne v. United States*, 5 Cir., 1964, 332 F. 2d 565; *Claypole v. United States*, 9 Cir., 1960, 280 F. 2d 768; Brown, *The Constitutionality of Statutory Criminal Presumptions, Modern Practice Commentator*, Vol. V, No. 1, p. 92, May 1967. Cf. *Maltos-Roque v. United States*, No. 23995, 5 Cir., decided July 12, 1967, . . . F. 2d. . . .

in *Yee Hem* v. *United States*, 268 U. S. 178, 45 S. Ct. 470, 69 L. Ed. 904 (1925), in reference to opium. The court said that as to marihuana, "If experience is the test of the validity of an inference, then the legislatively created inference in this case is well supported." 253 F. 2d at 517.

We believe, as was expressed so well in *United States* v. *Gainey*, 380 U.S. 63, 67, 85 S. Ct. 754, 13 L. Ed. 2d 658 (1965):

> "The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it."

That being true, and with the benefit of the legislative history to which we have already referred, it is clear that the experience of Congress shows that it is gravely concerned with the smuggling, transportation, concealment and possession of imported marihuana. When Congress passed the Marihuana Tax Act of 1937 from which are derived certain provisions of the United States Code involved here, i. e., 26 U.S.C. §§ 4741, 4742, and 4744, extensive Congressional hearings preceded the passage of the Act. They are referred to in appellant's brief as Hearings before the Committee on Ways and Means, 75th Cong., 1st Sess., H. R. 6385 (1937). The report of the proceedings shows unmistakably that Congress intended "to discourage the current and widespread undesirable use of marihuana," and that the development of a scheme of taxation would "render virtually impossible the acquisition of marihuana by persons who would put it to illicit uses." Witnesses referred to the "injurious effect it has upon the public health and morals of this country," especially for younger

people who are attracted to it. The then Commissioner of Narcotics, Mr. Anslinger, said, "This drug is entirely the monster Hyde, the harmful effect of which cannot be measured." He pointed out that all of the states had passed laws against marihuana. Numerous expert witnesses referred to the dangerous nature of the drug, its effect on those who use it, to criminal episodes of terrible character which accompanied its use. The evidence was voluminous and convincing that marihuana is a serious evil to society. Thus did Congress wisely and prudently enact this law and clearly meet the "compelling state interest" test imposed in *Sherbert* v. *Verner*, 374 U. S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963).[18]

Appellant contends that 26 U.S.C. § 4741(a), which imposes a tax on all transfers of marihuana, and 26 U.S.C. § 4742, which requires that such transfers be accompanied by written order forms issued by the Secretary of the Treasury, are unconstitutional in that they violate the Fifth Amendment privilege against compulsory self-incrimination. He argues, therefore, that his conviction under Count 3, which charged that defendant transported and concealed marihuana, being a transferee required to pay a transfer tax, in violation of 26 U.S.C. § 4744(a), is invalid. This Circuit has had occasion to rule on this precise point in *Haynes* v. *United States*, 5 Cir., 1964, 339 F. 2d 30, cert. den. 380 U. S. 924, 85 S. Ct. 926 (1965), in which the court found no merit to the contention "that the appellant was required to incriminate himself by registration and pay-

[18] See also additional legislative history supporting the propriety of anti-marihuana enactments by Congress: 1956 U. S. Code, Cong. & Adm. News, p. 3274, relative to the Narcotic Control Act of 1956 (when the legislative presumption was included which made the unexplained possession of marihuana by the defendant sufficient evidence for conviction); 1951 U. S. Code, Cong. & Adm. News, p. 2602, in which the Narcotic Drugs Import & Export Act and the Internal Revenue laws relative to narcotics was amended in order to provide greater uniformity of penalties for violations of those laws.

ment of taxes and, hence, that the statutes under which he was convicted are unconstitutional . . . ."[19]

We find, without merit, appellant's final point of error that the District Court erred in refusing to instruct the jury that they could consider as a defense to Count 2 defendant's honest and sincere belief that he had a right to possess marihuana in violation of the law because of his religious and scientific beliefs. Appellant argues that the jury could have found, if so instructed by the court, that this belief negated the specific intent necessary under 21 U.S.C. § 176a. This point is in effect substantially similar to those contentions of appellant which we have already considered and rejected relating to the defense of religious claims that appellant was honest and in good faith in his use of marihuana, and to the contention that the presumption in Section 176a that possession of marihuana is sufficient evidence to authorize conviction unless explained by the defendant to the satisfaction of the jury is unconstitutional.

AFFIRMED.

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[19] See also *Rule v. United States*, 5 Cir., 1966, 362 F. 2d 215, which upheld the constitutionality of 21 U.S.C. § 176a against an attack that the statute violated the Fifth Amendment privilege against self-incrimination; *Manning v. United States*, 5 Cir., 1960, 274 F. 2d 926, which upheld the constitutionality of the presumption in 26 U.S.C. § 4744(a) of guilt in failing to pay the transfer tax on marihuana (which presumption arises from failure to produce the required order forms) against an attack that due process had been violated; *Palma v. United States*, 5 Cir., 1958, 261 F. 2d 93, which upheld the constitutionality of 18 U.S.C. § 1407—which statute requires that a United States citizen, who has been convicted of violating a narcotics law under certain circumstances, register prior to departure from or entry into the United States—against attacks of unreasonable search and seizure under the Fourth Amendment, self-incrimination, lack of due process, vague and indefinite standards and restraint of civil liberty, under the Fifth Amendment, and cruel and unusual punishment under the Eighth Amendment; and *Reyes v. United States*, 9 Cir., 1958, 258 F. 2d 774, which upheld the constitutionality of the same statute, 18 U.S.C. § 1407.

APPENDIX B

Opinion of the United States Court of Appeals for the Fifth Circuit denying Petition for Rehearing

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 23570

TIMOTHY LEARY,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Texas

(March 29, 1968)

On Petition for Rehearing En Banc

Before:

GEWIN and AINSWORTH, *Circuit Judges*, and LYNNE, *District Judge*.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 25(a), subpar. (b), the Petition for Rehearing En Banc is DENIED.

In a supplementary petition for rehearing, appellant calls attention to three recent Supreme Court decisions rendered on January 29, 1968 (subsequent to our original opinion in this case, 383 F. 2d 851), in *Marchetti v. United States*, — U. S. —, — S. Ct. —; *Grosso v. United States*, — U. S. —, — S. Ct. —; and *Haynes v. United States*, — U. S. —, — S. Ct. —, and makes the contention that because of these holdings his conviction must be reversed on Count 3 of the indictment, which charged the transportation of marihuana as a transferee without having paid the transfer tax and without having secured and furnished the written order forms of the Secretary of the Treasury required by statute. See 26 U.S.C. §§ 4741(a), 4742, 4744(a). Appellant's position is that the statutory provisions referred to violate the Fifth Amendment privilege against self-incrimination, and that though this contention was rejected by us in our original opinion, the new rulings of the Supreme Court in *Marchetti*, *Grosso* and *Haynes* now compel a holding that the conviction on Count 3 is invalid because it is based on unconstitutional statutory provisions. From this it is contended that the arguments made and charge to the jury relating to Count 3 matters have necessarily prejudiced appellant's entire case, including his defense to Count 2, which charged a violation of 21 U.S.C. § 176a in transporting and facilitating the transportation and concealment of marihuana.

The Supreme Court set aside the conviction in *Marchetti*, which charged violations of the Federal Wagering Tax Statutes for evading payment of the annual occupational tax imposed by 26 U.S.C. § 4411 and for wilfully failing to register before engaging in the business of accepting wagers, as required by 26 U.S.C. § 4412. In *Grosso*, the conviction for wilful failure to pay the excise tax on wagering imposed by 26 U.S.C. § 4401, and for failure to pay the special occupational tax imposed by 26 U.S.C. § 4411, was reversed. In *Haynes*, the conviction for

violating 26 U.S.C. § 5851 in knowingly possessing a firearm, as defined by 26 U.S.C. § 5848(1), which had not been registered with the Secretary of the Treasury, as required by 26 U.S.C. § 5841, was reversed.

Appellant thus contends that these new Supreme Court decisions now require a reversal of the Count 3 conviction in that the appellant's transportation of marihuana, without having paid the transfer tax and without having secured and furnished the written order forms of the Secretary of the Treasury, is analogous to the statutory provisions relative to possessing an unregistered firearm referred to in *Haynes*, and to the statutory provisions relating to registration and occupational tax in connection with wagering activities referred to in *Marchetti* and *Grosso*. Appellant argues that the federal statutory provisions relating to marihuana, of which he stands convicted, thus penalize an individual's refusal so to incriminate himself.

We disagree with appellant's contentions because we believe the holdings in *Marchetti*, *Grosso* and *Haynes* are clearly distinguishable from the instant case.

The United States points out in its response to appellant's supplementary petition for rehearing that the statutes involved in the new Supreme Court cases differ from the marihuana statutes here in that under the former there are no licensing provisions and activities thereunder are always unlawful. The possession of marihuana, however, is not per se a crime. Under the law of Texas where the crime was committed, marihuana may be lawfully possessed under the law of that state by pharmacists, physicians and others. See Vernon's Texas Penal Code Art. 725b. The same is true under federal statutes where marihuana may be lawfully possessed. See 26 U.S.C. §§ 4741-4757 and 4771-4775. See also *United States v. Sanchez*, 340 U. S. 42, 71 S. Ct. 108 (1950).

In *Marchetti*, the Supreme Court also said (— U. S. —):

> "We emphasize that we do not hold that these wagering tax provisions are as such constitutionally im-

permissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements. If, in different circumstances, a taxpayer is not confronted by substantial hazards of self-incrimination, or if he is otherwise outside the privilege's protection, nothing we decide today would shield him from the various penalties prescribed by the wagering tax statutes."

Here, appellant took the stand and affirmatively waived the privilege against self-incrimination by testifying fully to the details of his acquisition and transportation of marihuana without having paid the tax or having secured the Treasury written order forms.

We reaffirm our prior ruling on this issue (based on several former decisions of this Court, namely, *Haynes v. United States*, 5 Cir., 1964, 339 F. 2d 30, cert. denied, 380 U. S. 924, 85 S. Ct. 926 (1965); *Rule v. United States*, 5 Cir., 1966, 362 F. 2d 215; and *Manning v. United States*, 5 Cir., 1960, 274 F. 2d 926) that the statutory provisions relating to marihuana (26 U.S.C. §§ 4741(a), 4742 and 4744(a)) which require that transfers of marihuana be accompanied by written order forms issued by the Secretary of the Treasury, in payment of the transfer tax, are not unconstitutionally violative of the Fifth Amendment privilege against compulsory self-incrimination.

Appellant's other contentions in his petition for rehearing have been fully considered and are amply discussed and disposed of in our original opinion.

Rehearing DENIED; rehearing en banc DENIED.

APPENDIX C

Judgment of the United States Court of Appeals for the Fifth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1966

No. 23570

D. C. Docket No. 66-L-37 Cr.

TIMOTHY LEARY,

Appellant,

VERSUS

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS.

Before:

GEWIN and AINSWORTH, *Circuit Judges*, and LYNNE, *District Judge*.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

September 29, 1967

Issued as Mandate: April 8, 1968

APPENDIX D

Constitutional and Statutory Provisions Involved

21 United States Code § 176:

". . . whoever, knowingly, with intent to defraud the United States . . . in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law . . . shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. . . ."

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

26 United States Code § 4741:

"(a) Rate—. . . .

"(2) Transfer to others.—Upon each transfer to any person who has not paid the special tax and registered under sections 4751 to 4753, inclusive, $100 per ounce of marihuana or fraction thereof.

"(b) By whom paid.—Such tax shall be paid by the transferee at the time of securing each order form and shall be in addition to the price of such form."

26 United States Code § 4742:

"(a) General requirement.—It shall be unlawful for any person . . . to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate. . . ."

26 United States Code § 4744:

"(a) Persons in general.—it shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a) (1) to acquire or otherwise obtain any marihuana without having paid such tax, or (2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.

Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be presumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a)."

Amendment I to the Constitution of the United States of America:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V to the Constitution of the United States of America:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX E

Correspondence Between the United States Attorney and Counsel for Petitioner

United States Department of Justice
UNITED STATES ATTORNEY
Southern District of Texas
P. O. Box 61129
Houston, Texas—77061

November 25, 1966

AIR MAIL

In Replying Please Refer
To This File Number: 661002
Professor Joel Jay Finer
2500 Red River Street
Austin, Texas 78705

Re: Leary v. United States
No. 23570—Fifth Circuit
Court of Appeals

Dear Professor:

I have for reply your letter dated November 21, 1966, concerning the referenced cause.

Information in our file indicates that the witness Raymond C. Cutler is the same person as Raymond Christopher Cutler.

Before Cutler testified in Laredo, he was interviewed by me and I specifically asked him about prior convictions which he denied. Cutler did admit to me (consistent with a statement given to Customs) that he had charges against him involving marihuana in California. Cutler was quite definite in stating that he had not pleaded guilty or been tried for any such offense, however. We have no information to the contrary and I do not know even at the present

time whether or not Cutler has ever been convicted of these or any other charges.

I do not recall either before, during or after the trial any inquiry by you or any other defense counsel for any information concerning Cutler. Thus, I am at a loss to understand your statement that we refused to disclose matters concerning Cutler. If we were asked by any counsel concerning Cutler's record, I would have gladly given the information. Also, the information could have been obtained by counsel during the trial under well known procedures with which you undoubtedly are more familiar than I.

(18 U.S.C. 3500).

Concerning your statement that the prosecution attempted to obstruct defense counsel's efforts on cross-examination I can only comment that reading the record shows that we only made one objection during the entire cross-examination which is reported at page 462. In that regard I know of no basis to impeach a witness in the manner attempted by Mr. Fitzgibbon and it seems to me that the objection was proper. As a matter of fact, we affirmatively agreed to more than one cross-examination of Cutler, including a change of counsel, in spite of the usual rule against that practice. I hardly think that our tactics can be classified as obstructive.

It was made abundantly clear to the jury that Cutler used not only marihuana but also LSD. It seems to me that Cutler's own admissions as to these behavioral abnormalities would affect his credibility in a much greater respect than a mere arrest on a marihuana charge. In any event, Cutler's true nature was presented to the jury so that they were able to evaluate fully the credibility, if any, to be given his testimony.

I trust that this is a full and complete answer to your letter but if it is not, I should be happy to respond further.

Sincerely,

/s/ MORTON L. SUSMAN
United States Attorney

MLS:fd

2500 Red River Street
Austin, Texas
November 21, 1966

Honorable Morton L. Susman
Ronald J. Blask, Esq.
James Gough, Esq.
Office of the United States Attorney
Federal Courthouse
Houston, Texas

Re: Timothy Leary
vs.
United States, No. 23570
U.S. Court of Appeals

Gentlemen:

As counsel for appellant in above entitled case, I am presenting an argument to the United States Court of Appeals based on my conclusion that the Raymond C. Cutler who testified at trial is the same person as the Raymond Christopher Cutler who was indicted in the United States District Court for the Southern District of California (No. 33291—Criminal) on August 5, 1964, for smuggling approximately twenty-five pounds of marihuana and fifty Dexedrine capsules into the United States from Mexico, and was indicted on September 30, 1964 in the same Court (No. 33505—CBS) for bail jumping in connection with the smuggling charge, and was the object of bench warrants issued for his arrest by the same Court on July 6, 1965 at least

one of which was in full force and effect on the day he testified at the trial of Dr. Leary.

In addition to the identity of first and last names and middle initials, and Mr. Cutler's testimony that he had used marihuana, personal investigation and corroborative hearsay have convinced me that the witness Cutler, and the Cutler whose record I have indicated are one and the same man. However, I am somewhat hesitant about presenting an argument critical of the prosecution's behavior premised on that conclusion, without being as certain as I can be of its validity. To be perfectly candid, and to avoid any suggestion of entrapment or lack of fair dealing, I now inform you that my argument alleges that the prosecution knew or should have known of Cutler's record and that it denied my client a fair trial in refusing to disclose it, in bolstering Cutler's credibility in closing arguments, and in obstructing defense counsel's efforts on cross-examination of Cutler. By this letter I am requesting that you inform me, as soon as possible, if my conclusion about the witness Cutler's record is not substantially correct. In the exercise of my duty to my client, I feel obliged to record your answer, or lack thereof in my brief.

Please call me as soon as possible, prior to November 28, 1966, at either AC 512—GR 1-5151 or AC 512—GR 7-4683, following the call with a letter to me at 2500 Red River Street, Austin, Texas 78705.

I trust and hope that our relations will remain cordial and that you will understand that I can do no less for my client.

Best regards,

Sincerely yours,

Joel Jay Finer
Counsel for Dr. Timothy Leary

JJF:ahs

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and rules involved	2
Statement	2
Argument	4
Conclusion	16
Appendix	17

CITATIONS

Cases:

Anthony v. *United States*, 331 F. 2d 687, certiorari denied, 368 U.S. 852	10
Braunfeld v. *Brown*, 366 U.S. 599	11
Butler v. *United States*, 273 F. 2d 436	10
Cantwell v. *Connecticut*, 310 U.S. 296	11
Caudillo v. *United States*, 253 F. 2d 513, certiorari denied *sub nom. Romero* v. *United States*, 357 U.S. 931	10
Grosso v. *United States*, 390 U.S. 62	4
Haynes v. *United States*, 390 U.S. 85	4
Marchetti v. *United States*, 390 U.S. 39	4, 6
Reynolds v. *United States*, 98 U.S. 145	11
Roberson v. *United States*, 249 F. 2d 737	14
Sherbert v. *Verner*, 374 U.S. 398	11
United States v. *Covington*, 3 Crim. L. Rep. 2027, reconsideration denied, May 6, 1968	4
United States v. *Gainey*, 380 U.S. 63	9
United States v. *Taylor*, 266 F. 2d 310, certiorari denied, 361 U.S. 853	10
Yee Hem v. *United States*, 268 U.S. 178	9

307-735—68——1

Constitution, statutes and regulations:

	Page
United States Constitution:	
First Amendment	9, 10
Fifth Amendment	4
Harrison Anti-Narcotic Act of 1914, as amended, 26 U.S.C. 4705(g)	7
Marihuana Tax Act:	
26 U.S.C. 4741	2
26 U.S.C. 4741(a)	4, 6, 17
26 U.S.C. 4741(b)	6, 7, 17
26 U.S.C. 4742	2, 6, 17
26 U.S.C. 4742(a)	17
26 U.S.C. 4742(b)	18
26 U.S.C. 4742(d)	18
26 U.S.C. 4743	2, 4, 19
26 U.S.C. 4744	2, 19
26 U.S.C. 4744(a)	2, 4, 6, 15, 19
26 U.S.C. 4751	2, 6, 7, 19
26 U.S.C. 4752	2, 6, 20
26 U.S.C. 4752(a)	20
26 U.S.C. 4752(b)	21
26 U.S.C. 4752(c)	21
26 U.S.C. 4753	2, 6, 7, 21
26 U.S.C. 4753(a)	21
26 U.S.C. 4771(a)	4
21 U.S.C. 174	9
21 U.S.C. 176a	2, 5, 9, 14, 15
18 U.S.C. 4208(b)	3
N.Y. Public Health Law, § 3323.3	9
Texas Penal Code, Art. 725b, § 5(3)	8
Uniform Narcotic Drug Act, 9B U.L.A. 409 et seq.	7, 8
26 C.F.R. 152.61	2, 21
26 C.F.R. 152.62	2, 22
26 C.F.R. 152.63	2, 7, 22

Constitution, statutes and regulations

Uniform Narcotic Drug Act—Continued

	Page
26 C.F.R. 152.64	2, 22
26 C.F.R. 152.65	2, 22
26 C.F.R. 152.66	2, 7, 22
26 C.F.R. 152.67	2, 7, 22
26 C.F.R. 152.68	2, 7, 22

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1365

TIMOTHY F. LEARY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The initial opinion of the court of appeals (Pet. App. A) is reported at 383 F. 2d 851; the opinion denying rehearing and rehearing *en banc* (Pet. App. B) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 1967. A petition for rehearing and rehearing *en banc* was denied on March 29, 1968. The petition for a writ of certiorari was filed on April 27, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, petitioner's prosecution for transporting non-tax-paid marihuana in violation of 26 U.S.C. 4744(a)(2) is barred by the privilege against self-incrimination.

2. Whether the presumption in the marihuana importation statute (21 U.S.C. 176a) is constitutional.

3. Whether petitioner's religious beliefs are a defense to his prosecution for marihuana violations.

4. Whether, in the circumstances, it was reversible error for the prosecutor to fail, on his own initiative, to inform the defense that one of the government's witnesses was under federal indictment on unrelated charges.

5. Whether the indictment adequately apprised petitioner of the nature of the offenses with which he was charged.

STATUTES AND RULES INVOLVED

The relevant statutes and rules (26 U.S.C. 4741–4744; 26 U.S.C. 4751–4753; 26 C.F.R. 152.61–152.68) are set forth in Appendix A, *infra*, pp. 17–24).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of transporting and concealing fraudulently imported and non-tax-paid marihuana in violation of 21 U.S.C. 176a and 26 U.S.C. 4744(a)(2).[1] On March 11, 1966, pursuant to 18 U.S.C. 4208(b), he was tenta-

[1] Petitioner's daughter, Susan Leary, who waived jury trial, was convicted of transporting non-tax-paid marihuana (26

tively sentenced to the maximum punishment, pending completion of a study and recommendation to be used by the court in determining the ultimate sentence. The court of appeals affirmed the convictions (Pet. App. A), and denied rehearing (Pet. App. B).

The government's evidence showed that at approximately 6:45 p.m. on December 22, 1965, petitioner and four others arrived at the secondary inspection area, Laredo International Bridge, Laredo, Texas. On being requested to unload the baggage, petitioner stated that the five occupants had earlier crossed the bridge to the Mexican Inspection Station, but had been denied permission to enter Mexico until the following morning. A customs inspector observed some vegetable material and seeds on the floor of the auto, and the material appeared to be and was in fact marihuana (R. 70–76). Thereafter, petitioner's daughter was found to have in her possession a silver snuff box containing marihuana cigarettes (R. 109–110). When confronted with this evidence, petitioner stated that he had given it to his daughter on the way back across the bridge and had told her to get rid of it (R. 156).

Petitioner testified that, *inter alia*, he had purchased the marihuana in New York (R. 313, 349, 357), and that he would not pay the tax imposed by Section 4741(a)(2) because the tax amounted to an unwarranted infringement upon the exercise of his religious and scientific pursuits (R. 344–345, 348).

U.S.C. 4744(a)(2)), and was sentenced under the provisions of the Youth Corrections Act. Her appeal from that conviction was dismissed on her own motion.

ARGUMENT.

1. Relying generally upon this Court's decisions in *Marchetti* v. *United States*, 390 U.S. 39, *Grosso* v. *United States*, 390 U.S. 62, and *Haynes* v. *United States*, 390 U.S. 85, petitioner contends that his payment of the transfer tax imposed by 26 U.S.C. 4741 (a)(2) would have necessitated incriminating disclosures in violation of his Fifth Amendment privilege against self-incrimination.[2] We urge, on the contrary, that enforcement of the marihuana laws by criminal prosecution does not impinge upon the privilege.

Payment of the tax imposed by Section 4741(a) on the acquisition of marihuana is represented by a stamp affixed by the Treasury to an official order form (26 U.S.C. 4743, 4771(a)). To obtain the order form, the person who intends to obtain marihuana must submit an application and a money order or check to cover the tax due. Thus the possible incrimination, if any, would occur with submission of the application form. In *Marchetti*, *Grosso*, and *Haynes*, each petitioner maintained that he had refused to pay the tax only because such payment would have necessitated incriminating disclosures on accompanying registration forms. Here, however, it is clear that petitioner failed to pay the tax, not because of any fear of possible self-incrimination, but for quite unrelated reasons. Thus, petitioner testified on direct examination that he failed to

[2] This claim was not raised until petitioner's motion for a new trial. Compare *United States* v. *Covington*, 3 Crim. L. Rep. 2027 (S.D. Ohio, March 27, 1968), reconsideration denied, May 6, 1968, where the district court sustained a motion to dismiss an indictment under 26 U.S.C. 4744(a), upon timely assertion of the privilege.

pay the tax because he knew that any application for the order form would have been rejected by the agency entrusted with enforcement of the Act (Internal Revenue Service and Bureau of Narcotics).[3] He also represented that religious beliefs prompted his refusal to take any steps towards payment of the tax, contending that the government had no right or power to tax the means of furthering his religious beliefs.[4] Thus, it is evident that petitioner would not have paid the tax even if to have done so would have involved no risk of incrimination—a conclusion which is reinforced by petitioner's failure to challenge the taxing scheme on self-incrimination grounds, while at the same time asserting such a claim in opposition to the smuggling count charged under the provisions of 21 U.S.C. 176a (see R. 50).[5] In these circumstances, petitioner is in no position to complain about the possibility of incrimination which might have flowed from his voluntary compliance with the terms of the Act; his own volunteered testimony clearly demonstrated that he

[3] Petitioner testified that his applications for acquisition of mescaline, peyote, and LSD had been denied on previous occasions (R. 347), and that he had been aware that the Internal Revenue Service would not issue order forms for the acquisition of marihuana to persons other than those registered under the terms of the Act. (R. 344).

[4] (R. 344): "Q. Did you or not entertain the belief that you did not have to pay this tax?

"A. [By petitioner] I consider taxes on pursuit of knowledge or on religion to be a violation against religion. When a man has to pay a tax—or a tax to pay on his religion, I think it's time to say, 'You have gone too far' to the agents who want you to pay taxes for these purposes."

[5] This latter count was later dismissed on motion for acquittal.

would not have complied with the tax provisions in any circumstances.

In any event, the operation and administration of the Marihuana Tax Act present no "'real,' and not merely trifling or imaginary, hazards of incrimination." *Marchetti* v. *United States, supra,* 390 U.S. at 53. The scheme of the statute here involved is critically different from that in the gambling and the firearms tax statutes and does not present the same risks of self-incrimination. This Act imposes a tax on all transfers of marihuana (26 U.S.C. 4741(a)),[6] and requires that all such transfers be made pursuant to a contemporaneous exchange of an order form issued in blank to the transferee by the Secretary of the Treasury or his delegate (26 U.S.C. 4742). The rate of the transfer tax—to be paid by the transferee[7]—is one dollar per ounce on transfers to persons registered under the applicable provisions of the Act (26 U.S.C. 4751–4753), and one hundred dollars per ounce on transfers to persons, like petitioner, who are not registered (26 U.S.C. 4741(a)). Payment of the tax is evidenced by a tax stamp affixed to the order form. To obtain the order form a person must submit to the District Director of Internal Revenue an application (Form 679a) stating the names and addresses of the proposed transferor and transferee, a description, including the quantity, of the marihuana desired to be transferred, and the transferee's registry number, if so registered under the applicable provisions. A money

[6] With exceptions irrelevant here.

[7] In the event that the transferee does not pay the tax, the transferor becomes liable for its payment (26 U.S.C. 4741(b)).

order or check to cover the amount of tax imposed upon the transaction must be remitted with the application (26 U.S.C. 4741(b); 26 C.F.R. 152.63, 152.66).

Since its enactment, the Internal Revenue Service and Bureau of Narcotics have interpreted and administered this Act *in pari materia* with the Harrison Anti-Narcotic Act of 1914. That is to say, the Act has been administratively interpreted as permitting registration only by those persons whose dealings in marihuana would be in compliance with state law. See 26 U.S.C. 4705(g). The registration requirement in 26 U.S.C. 4753 is expressly conditioned upon the applicability of the occupational tax requirements of Section 4751. But an analysis of the latter section shows, on its face, that the occupational tax provisions (and thus the registration) are directed only toward those who may *lawfully* engage in marihuana transactions under state law. In enumerating the classes of professionals subject to the occupational tax (and registration, derivatively), Section 4751 follows the enumeration of classes of individuals who, under Sections 3–7 of the Uniform Narcotic Drug Act, 9B U.L.A. 409 *et seq.*—in force in all American jurisdictions—might lawfully manufacture, wholesale, dispense, prescribe, or possess marihuana. Under the Marihuana Tax Act, as administratively construed and applied, persons who are not registered—including, of course, those who are not eligible for registration because their involvement with marihuana would violate state law—are not permitted to pay the tax or to acquire marihuana (see 26 C.F.R. 152.66–152.68, requiring that applications for order forms must be signed

by the same person or persons signing the application for registration). If on the face of the application for an order form it appears that the applicant is not lawfully registered—as would be the case with petitioner—the application and the tax tendered are immediately returned to the applicant. No record is made of the application.[8]

Thus this taxing scheme, as applied, provides for the registration only of legitimate dealers and in effect prohibits marihuana transactions or possession by non-registered persons. Legitimate dealers can and do register without incriminating themselves under either state or federal law. Under Section 5(3) of the Uniform Narcotic Drug Act[9] a person who complies with the order form requirements of the Marihuana Tax Act is deemed to be in compliance with state law. Thus, unlike the wagering and firearms statutes, lawful compliance with federal requirements cannot incriminate the person under state law. Alternatively, persons who intend to acquire marihuana illegitimately cannot incriminate themselves because they are *not allowed* to register and thus are, in essence, told that it would be illegal for them to acquire marihuana. Since no record is kept of those who unsuccessfully apply for an order form because they are not eligible, there is no real danger of incrimination. Petitioner is not being punished for failure to disclose unlawful conduct. Rather, he has been convicted for transporting

[8] We reiterate petitioner's own testimony (note 3, *supra*, p. 5) that his applications for permission to obtain other regulated drugs had been denied.

[9] See, *e.g.*, N.Y. Public Health Law, § 3323.3; Texas Penal Code, Art. 725b, § 5(3).

marihuana which (as he acknowledged) he could not obtain authority to possess. The values protected by the privilege against self-incrimination are in no way compromised by punishing such unauthorized conduct.

2. Petitioner's challenge to the constitutionality of the importation statute (21 U.S.C. 176a) presents no issue warranting further review by this Court. It is well established that the legislative inference allowed by 21 U.S.C. 174 (which in this respect is identical to that in 21 U.S.C. 176a) does not compel a defendant to testify in his own behalf. *Yee Hem* v. *United States*, 268 U.S. 178; cf. *United States* v. *Gainey*, 380 U.S. 63. If a defendant chooses not to explain his possession of marihuana, the jury may, but is not compelled to, infer that he was aware of the illegal importation.[10] To be sure, he may be convicted if he fails to testify in his own behalf—but that is true in every case where the government makes a *prima facie* showing of guilt. In addition, a defendant can exculpate himself through the testimony of other witnesses, not merely through his own testimony.

Notwithstanding the argument that marihuana is grown, albeit illegally in most instances, in the United States, the presumption of illegal importation has consistently been held rational and valid. This conclusion is especially forceful in a case, such as this, where seeds are found—indicating marihuana in an "un-

[10] In light of petitioner's defense that the First Amendment allowed his unfettered use of marihuana in pursuit of his religious ideals (see pp. 10–11, *infra*), petitioner would have been "compelled" to testify in his own behalf even if the importation count were not included in the indictment.

manicured" state.[10a] *Caudillo* v. *United States*, 253 F.2d 513 (C.A. 9), certiorari denied *sub nom. Romero* v. *United States*, 357 U.S. 931; *Butler* v. *United States*, 273 F.2d 436 (C.A. 9); *United States* v. *Taylor*, 266 F.2d 310 (C.A. 7), certiorari denied, 361 U.S. 853; *Anthony* v. *United States*, 331 F.2d 687 (C.A. 9), certiorari denied, 368 U.S. 852. The jury in such a situation should be allowed to determine whether it chooses to draw the permissible inference or to accept defense evidence offered to offset it.

3. Petitioner's principal defense at trial and his major contention before the court of appeals (Pet. App. A 1–2) was that he used marihuana in pursuit of his religious ideals (see generally, R. 267–312, 402–418, 422–434). He testified that he had joined a Hindu sect in the summer of 1963 (R. 268), and that many of the Hindu sects used marihuana in the practice of that religion in order to attain a high level of consciousness (R. 288, 294–295, 297–298). Petitioner admitted that the use of marihuana was not essential to the practice of his religion, but expressed the view that the government did not have the power to take marihuana away from him (R. 302–303). At the conclusion of the case, the trial court refused to give an instruction to the effect that, assuming the sincerity and honesty of petitioner's religious belief and the use of marihuana in connection therewith, such beliefs would constitute a defense to the crimes charged. (R. 527–530).

[10a] The court below also referred to testimony before Congress indicating that most marihuana used in this country still comes from Mexico (Pet. App. A 30–32).

This instruction was properly denied. The First Amendment does not prohibit Congress from regulating the transportation and concealment of fraudulently imported and non-tax-paid marihuana. As stated by this Court, religious freedom "embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society". *Cantwell* v. *Connecticut,* 310 U.S. 296, 303–304. See, also, *Braunfeld* v. *Brown,* 366 U.S. 599; *Reynolds* v. *United States,* 98 U.S. 145. Petitioner's reliance upon *Sherbert* v. *Verner,* 374 U.S. 398, is misplaced. There the Court found no "compelling state interest" in disqualifying that petitioner from unemployment benefits because her religious beliefs prohibited work on Saturdays, the day of her Sabbath. Here, however, as the court below noted, the Congress has shown grave concern with respect to the use of marihuana (Pet. App. A 13). This compelling governmental concern is clearly adequate to negate petitioner's assertion of a right to the unfettered use of marihuana as an aid in the practice of his religion—especially in view of the fact that such use was not, by his own admission, essential to the perfection of his religious beliefs.

4. On cross-examination, consistent with his defense that the use of marihuana was for the purpose of furthering his religious beliefs, petitioner testified that he had never smoked marihuana at "Greenwich Village parties" for social purposes. (R. 368–369). On rebuttal, a government witness, Raymond Cutler, testified that petitioner had in fact smoked marihuana

at a social function in Greenwich Village prior to the time petitioner purportedly began to smoke marihuana for religious purposes in India (R. 449–450).

On cross-examination, petitioner's counsel showed that Cutler himself had smoked marihuana and had taken LSD (R. 450–451, 453). He also attempted to show Cutler's bias by bringing out the fact that he had been paid certain expenses by the government in connection with his testimony at the trial. Petitioner's counsel then asked, "* * * how many times have you been picked up for smoking marihuana?" Upon government objection, the court ruled that if counsel sought to impeach the credibility of the witness, he would have to do so by showing a prior conviction. Cutler was then asked if he had any previous felony convictions, and answered in the negative.[11]

While the case was pending on appeal, petitioner's counsel inquired of the United States Attorney

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[11] The relevant cross-examination was as follows (R. 461–462):

"By Mr. FITZGIBBON [defense counsel]:

"Q. You say you live in New York?

"A. Yes, sir.

"Q. And when did you arrive in Laredo?

"A. Sunday night.

"Q. Sunday night?

"And, of course, you were paid by the government to come down here, were you not?

"A. I wasn't paid by the government to come down here. My expenses were paid, yes.

"Q. Well, it's somewhat of an equivocation. Your expenses were paid to come down?

"A. Yes. But I am receiving no salary or anything like that.

"Q. You receive a certain amount of money per day, do you not?

"A. Yes. I believe so.

"Q. So you are being paid, then?"

whether Cutler was, at the time he testified, under indictment in the United States District Court for the Southern District of California for smuggling and for "bail jumping." The United States Attorney replied that Cutler had told him that there were charges pending in California to which he had pleaded not guilty. The United States Attorney stated that neither before, nor during, nor after trial, had any defense counsel asked for information concerning Cutler but that had anyone inquired the United States Attorney would have advised the defense that it understood there were unrelated charges outstanding in California. (Pet. App. E 42–45.)

Petitioner argues that by objecting to the question as to how many times Cutler had been picked up for smoking marihuana, and failing affirmatively to disclose that Cutler was under indictment in California, the government improperly withheld information from the defense. In context, however, it is clear that all parties—defense counsel, the United States Attorney, and the court—considered defense counsel's question as an improper attempt at general impeachment on the basis of prior arrests rather than convictions and

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"Now, what—how many times have you been picked up for smoking marihuana?

"Mr. SUSMAN: We object to that, your Honor.

"The COURT: Are you undertaking to impeach the credibility of the witness? If you are, you may prove it by a prior conviction of felony.

"Mr. FITZGIBBON: Yes, your Honor.

"Q. (By Mr. Fitzgibbon) Have you been convicted of a felony in this state or any other state?

"A. No. I have not.

"Q. You have not?

"Mr. FITZGIBBON: Pass the witness."

not as concerned with exploring the relationship between the witness and the government. The prosecutor's objection was quite proper, for it is well established that credibility may be impeached only by showing prior convictions of felonies or misdemeanors involving moral turpitude, *e.g.*, *Roberson* v. *United States*, 249 F. 2d 737 (C.A. 5), and not by prior arrests or accusations by indictment. The prosecutor had no reason to suspect that the pending smuggling and bail violation charges had any relation to the general question about being "picked up for smoking marihuana". If the defense had suggested that it was trying to find out if the government had some current hold over the witness, the question no doubt would have been allowed and the facts disclosed.

In addition, the incident has no real significance. The government used Cutler as a rebuttal witness only to negate petitioner's defense that he used marihuana solely in furtherance of his religious pursuits. Inasmuch as this defense was subsequently properly removed from the jury's consideration (see pp. 10–11, *supra*), Cutler's testimony was of no importance. Petitioner admitted that he possessed and transported marihuana.

5. Count one of the indictment charged that petitioner clandestinely smuggled marihuana into the United States in violation of 21 U.S.C. 176a. Count two charged that he transported marihuana which had already been fraudulently imported, a separate violation of 21 U.S.C. 176a. Prior to trial, petitioner, by way of motions for a bill of particulars, attempted to compel the government to elect a theory of prosecution based

on either smuggling, or unlawful transportation, but not both (R. 25–26, 41–42). Those motions were denied. At the conclusion of the case, the court, over the government's objection, and apparently crediting defense testimony that petitioner had purchased the marihuana in New York, and had not actually entered the Republic of Mexico prior to his return to the continental United States across the international bridge, granted petitioner's motion to dismiss count one, charging smuggling (R. 520–526). The court decided to submit the transportation count to the jury.

There was nothing necessarily inconsistent in the treatment of these two counts under 21 U.S.C. 176a. The government, to prove smuggling, intended to rely on the inference stemming from the fact that petitioner had entered the Laredo customs station from the direction of the Republic of Mexico. The jury could have been permitted to find that petitioner had transported marihuana from the United States to Mexico and then smuggled it back into the United States from Mexico. Petitioner is in no position to complain that the court credited his testimony and granted the motion to dismiss the smuggling count and allowed only the transportation counts under 21 U.S.C. 176a and 26 U.S.C. 4744(a)(2) to go to the jury.[12]

[12] Of course, petitioner would be equally guilty of violating Section 176a by knowingly transporting unlawfully imported marihuana whether or not he himself had been the smuggler. As the court below pointed out (Pet. App. A 19), petitioner's own testimony at trial was more than sufficient to authorize conviction, regardless of where he obtained the marihuana. His only defense was that his religious predilections entitled him to obtain and use marihuana.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

MAY 1968.

APPENDIX

A. Pertinent provisions of the Marihuana Tax Act:

26 U.S.C. 4741 provides:

(a) Rate.

There shall be imposed upon all transfers of marihuana which are required by section 4742 to be carried out in pursuance of written order forms taxes at the following rates:

(1) Transfers to special taxpayers.

Upon each transfer to any person who has paid the special tax and registered under sections 4751 to 4753, inclusive, $1 per ounce of marihuana or fraction thereof.

(2) Transfers to others.

Upon each transfer to any person who has not paid the special tax and registered under sections 4751 to 4753, inclusive, $100 per ounce of marihuana or fraction thereof.

(b) By whom paid.

Such tax shall be paid by the transferee at the time of securing each order form and shall be in addition to the price of such form. Such transferee shall be liable for the tax imposed by this section but in the event that the transfer is made in violation of section 4742 without an order form and without payment of the transfer tax imposed by this section, the transferor shall also be liable for such tax.

26 U.S.C. 4742 provides in pertinent part:

Order forms.

(a) General requirement.

It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such mari-

huana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate.

* * * * *

(c) Supply.

The Secretary or his delegate shall cause suitable forms to be prepared for the purposes mentioned in this section and shall cause them to be distributed to each internal revenue district for sale. The price at which such forms shall be sold shall be fixed by the Secretary or his delegate, but shall not exceed 2 cents each. Whenever any of such forms are sold, the Secretary or his delegate shall cause the date of sale, the name and address of the proposed vendor, the name and address of the purchaser, and the amount of marihuana order to be plainly written or stamped thereon before delivering the same.

(d) Preservation.

Each such order form sold by the Secretary or his delegate shall be prepared to include an original and two copies, any one of which shall be admissible in evidence as an original. The original and one copy shall be given to the purchaser thereof. The original shall in turn be given by the purchaser thereof to any person who shall, in pursuance thereof, transfer marihuana to him and shall be preserved by such person for a period of 2 years so as to be readily accessible for inspection by an officer or employee mentioned in section 4773. The copy given to the purchaser shall be retained by the purchaser and preserved for a period of 2 years so as to be readily accessible to inspection by any officer or employee mentioned in section 4773. The second copy shall be preserved in the records of the internal revenue district.

* * * * *

26 U.S.C. 4743 provides:

The stamps provided in section 4771(a)(1) for marihuana shall be affixed by the Secretary or his delegate to the original order form.

26 U.S.C. 4744 provides in pertinent part:

(a) Persons in general.

It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a)—

(1) to acquire or otherwise obtain any marihuana without having paid such tax, or

(2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.

Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be persumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a).

* * * * *

26 U.S.C. 4751 provides:

Imposition of tax.

Every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, prescribes, administers, or gives away marihuana shall before engaging in any of the above-mentioned activities, and thereafter on or before July 1 of each year, pay the following special taxes respectively:

(1) Importers, manufacturers, and compounders.

Importers, manufacturers, and compounders of marihuana, $24 a year;

(2) Producers.

Producers of marihuana (except those included within paragraph (4)), $1 a year, or fraction thereof, during which they engage in such activity;

(3) Physicians, dentists, veterinary surgeons, and other practitioners.

Physicians, dentists, veterinary surgeons, and other practitioners who distribute, dispense, give away, administer, or prescribe marihuana to patients upon whom they in the course of their professional practice are in attendance, $1 a year, or fraction thereof, during which they engage in any of such activities.

(4) Persons engaged in research, instruction, or analysis.

Any person not registered as an importer, manufacturer, producer, or compounder who obtains and uses marihuana in a laboratory for the purpose of research, instruction, or analysis, or who produces marihuana for any such purpose, $1 a year, or fraction thereof, during which he engages in such activities;

(5) Persons not otherwise taxed.

Any person who is not a physician, dentist, veterinary surgeon, or other practitioner and who deals in, dispenses, or gives away marihuana, $3 a year; *Provided*, That any person who has registered and paid the special tax as an importer, manufacturer, compounder, or producer, as required by paragraphs (1) and (2), may deal in, dispense, or give away marihuana imported, manufactured, compounded, or produced by him without further payment of the tax imposed by this section;

(6) Millers.

Any person who at a mill manufactures or produces from the plant Cannabis sativa L. any fiber or fiber products, $1 a year, or fraction thereof, during which he engages in such activities.

26 U.S.C. 4752 provides:

(a) Computation of tax.

Where a tax under paragraph (1) or (5) of section 4751 is payable on July 1 of any year it shall be computed for 1 year; where any such

tax is payable on any other day it shall be computed proportionately from the first day of the month in which the liability for the tax accrued to the following July 1.

(b) Liability in case of activities in more than one place.

In the event that any person subject to a tax imposed by section 4751 engages in any of the activities enumerated in such section at more than one place, such person shall pay the tax with respect to each such place.

(c) Liability in case of more than one activity by same person at same time.

Except as otherwise provided, whenever more than one of the activities enumerated in section 4751 is carried on by the same person at the same time, such person shall pay the tax for each such activity, according to the respective rates prescribed.

26 U.S.C. 4753 provides in pertinent part:

(a) In general.

Any person subject to the tax imposed by section 4751 shall, upon payment of such tax, register his name or style and his place or places of business with the official in charge of the internal revenue district in which such place or places of business are located.

* * * * *

B. Pertinent provisions of the Treasury Department Regulations relating to marihuana—

26 C.F.R. 152.61 provides:

Scope of tax.

Except as otherwise provided, each transfer of marihuana to a person within the United States is subject to tax, to be paid in the manner hereinafter indicated. The tax is due whether the transferor be located within the United States or elsewhere. The tax applies to every transfer, no matter how often the same material may be transferred. It is no basis of exemption that a

transferred article was produced from material on the transfer of which tax was paid.

26 C.F.R. 152.62 provides:

Amount of tax.

Where the transfer is to a taxable person who has duly registered and paid special tax, the transfer tax is at the rate of $1 per ounce or fraction thereof. If the transfer is to a person who has not registered and paid the special tax under this act, tax at the rate of $100 per ounce or fraction thereof is due.

26 C.F.R. 152.63 provides:

Method of payment.

The tax is paid by attachment of adhesive stamps to order forms as hereinafter shown. Stamps of various denominations are available. Payment for the stamps shall be made when application for the order form is submitted.

26 C.F.R. 152.64 provides:

Affixing and canceling of stamps.

The proper stamp, evidencing the payment of the transfer tax, shall be affixed to the original order form by the district director or his representative, and the person so affixing the stamp shall cancel it by writing or stamping thereon, in ink, his initials, and the day, month, and year, or shall, by cutting with a machine or punch affix his initials and the date as aforesaid, in such manner as to render it unfit for reuse. The cancellation shall not so deface the stamp as to prevent its denomination and genuineness from being readily determined.

26 C.F.R. 152.65 provides:

Reuse of stamps prohibited.

A stamp once affixed to one order form cannot lawfully be removed and affixed to another. As to refunds for amounts paid for stamps, see § 152.124.

26 C.F.R. 152.66 provides:

Written order required for transfer of marihuana.

Except as otherwise provided, every person seeking to obtain marihuana shall make application on Form 679a (Marihuana) to the district director of internal revenue for the district in which the transferee is located for the purchase of an order form. The application shall show (a) the transferee's name, address, and, if registered, the registration number, (b) the name and address of the transferor, and (c) a description, including quantities, of the desired articles or materials to be transferred. The application must be accompanied by a check, cash, or money order in payment of the transfer tax (see § 152.62), plus 2 cents in payment for the order form.

26 C.F.R. 152.67 provides:

Signing of application.

Generally, applications for order forms shall be signed by the same person or persons signing the application for registration (see § 152.25). However, when it is impracticable for the person signing the application for registration to sign the applications for order forms they may be signed by another person, provided a power of attorney authorizing such other person to sign the applications for order forms has previously been filed with and approved by the district director. The power of attorney shall be executed on Form 1315, or a substantially similar form, in the same manner as applications for registration, shall show the signature of the person thereby authorized to sign applications for order forms, and shall affirm that the signature as shown is his signature.

26 C.F.R. 152.68 provide:

Signatures to be compared.

Upon receipt by the district director of an application for an order form the signature on such application shall be compared with that appearing on the application for registration or in the power of attorney (see § 152.67). Unless the district director is satisfied that the application is authentic it will not be honored.

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IN THE

Supreme Court of the United States

October Term 1968

No. 65

TIMOTHY F. LEARY,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

ROBERT J. HAFT,
Attorney for Petitioner,
140 East 80th St.,
New York, N. Y. 10021.

Of Counsel:
JOEL JAY FINER,
JEROME SIEGMAN.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional, Statutory and Regulatory Provisions Involved	2
Statement	3
Summary of Argument	5
ARGUMENT:	
I. The Fifth Amendment privilege against self-incrimination bars conviction under 26 U.S.C. § 4744(a) for failure to pay the tax imposed upon a transferee of marihuana	6
A. The Self-Incriminatory Nature of the Statutes Under Which Petitioner was Convicted	6
1. The Statutory Scheme	8
2. Possible Constructions of the Statutory Scheme	9
3. Incriminatory effect if registration and special tax inapplicable but transfer tax applicable to illegal possessors	9
4. Incriminatory Effects if all Provisions Apply to Illegal Possessors	11
5. The Government's Statutory Construction: No Provisions apply to illegal Possessors except criminal sanctions	12
6. Summary	15

PAGE

B. Petitioner did not waive his privilege by taking the stand in his own defense 16

C. This Court Should Not Attempt to Save the Constitutionality of This Statute by Imposing Restrictions on the Use by State and Local Prosecutors of the Information Obtained as a Consequence of Compliance With the Statutory Scheme 17

D. A Determination in Petitioner's Favor on This Issue Should Serve to Reverse His Conviction on Both Counts 18

II. Petitioner was denied due process under the Fifth Amendment by the application, under the circumstances of this case, of the provisions of 21 U.S.C. § 176a, providing that an inference may be drawn respecting the illegal origin and nature of marihuana and knowledge thereof solely from possession 19

A. The 21 U.S.C. § 176(a) Presumption is Arbitrary and Unreasonable 20

B. As Construed and Applied by the Lower Courts, Under the Circumstances of This Case, the Presumption Eliminated the Elements of Illegal Transportation and Knowledge Thereof from the Statute 24

1. Elimination of the elements of illegal importation and knowledge thereof from the Statute 24

2. Failure to provide guidelines for the words "to the satisfaction of the jury" 27

CONCLUSION 28

Table of Citations

CASES

PAGE

Chavez v. *United States*, 343 F.2d 85 (9th Cir. 1965) 19n, 22n, 26, 27

Erwing v. *United States*, 323 F.2d 674 (9th Cir. 1963) 22n

Griego v. *United States*, 298 F.2d 845 10th Cir. 1962) 19n, 22n

Grosso v. *United States*, 390 U.S. 62 (1968) .. 2, 4, 5, 6, 8, 17, 17n

Harris v. *United States*, 359 U.S. 19, 23 (1959) 19n

Haynes v. *United States*, 390 U.S. 85 (1968) 2, 4, 5, 6

Marchetti v. *United States*, 390 U.S. 39 (1968) 2, 4, 5, 6, 7, 17, 17n, 18

Murphy v. *Waterfront Commission*, 378 U.S. 52 (1964) 17

Roviaro v. *United States*, 353 U.S. 53 (1957) 22n

Symons v. *United States*, 178 F.2d 615 (9th Cir. 1949) 20

Tot v. *United States*, 319 U.S. 463 (1943) 6, 20, 21

United States v. *Gainey*, 380 U.S. 63 (1965) 20

United States v. *Peeples*, 377 F.2d 205 (2nd Cir. 1967) 26

United States v. *Romano*, 382 U.S. 136 (1965) 21

Yee Hem v. *United States*, 268 U.S. 178 (1925) .. 20, 22

Constitutions, Statutes and Regulations

Constitution of the United States:

	PAGE
Amendment V	2, 16, 20, 24

Statutes of the United States:

21 U.S.C. § 174	19n, 20
21 U.S.C. § 176a	2, 3, 4, 5, 7, 16, 18, 19, 20
26 U.S.C. § 4741	2, 5, 8, 10, 11n, 13, 18
26 U.S.C. § 4742	2, 5, 8, 8n, 13, 13n
26 U.S.C. § 4744	2, 3, 5, 6, 8, 8n, 10, 14, 14n, 16, 19, 25n
26 U.S.C. § 4751	11, 13, 15
26 U.S.C. § 4753	11
26 U.S.C. § 4754	9
26 U.S.C. § 4773	8, 8n
26 U.S.C. § 4775	9, 11

Treasury Regulations:

26 C.F.R. 152.66	8n, 13n

Miscellaneous

Reports of the Commissioner of Internal Revenue, 1960-67	9
Reports of the Commissioner of Internal Revenue, 1952-1967	17n
Hearings on H.R. 6385 before the Committee on Ways and Means, 75th Cong. 1st Sess.	12n
1956 U.S. Code Cong. and Adm. News	14n, 20
President's Commission on Law Enforcement and the Administration of Justice: A Task Force Report: Narcotic and Drug Abuse (1967)	18n

IN THE

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No. 65

TIMOTHY F. LEARY,

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UNITED STATES OF AMERICA,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals for the Fifth Circuit (App. A, 1a-36a), is reported at 383 F.2d 851 (1967); its opinion denying Petitioner's application for rehearing is reported at 392 F.2d 220 (1968) (App. B, 37a-40a). The Court of Appeals affirmed the judgment of the District Court for the Southern District of Texas, Laredo Division. No opinion was rendered by the District Court.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on September 29, 1967 (App. C, 41a). On October 20, 1967, an application was made for rehearing. The application was denied in a decision dated March 29, 1968 (App. B, 37a-40a). The petition for writ of certiorari was filed on April 27, 1968, and was granted on June 10, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

Petitioner has been convicted and sentenced to a maximum prison term of 30 years and fined $40,000, subject to the provisions of 18 U.S.C. § 4208(b), for offenses relating to his alleged possession of less than one-half ounce of marihuana (R. 640-44). Specifically, Petitioner was found guilty of violating 21 U.S.C. § 176a (unlawfully and knowingly transporting illegally imported marihuana, with knowledge of illegal importation and intent to defraud) and 26 U.S.C. § 4744(a)(2) (unlawfully and knowingly transporting marihuana, as a transferee required to pay the transfer tax, without having paid such tax (R. 44, 45, 637-638)).

The questions presented herein are:

I. Whether the provisions of 26 U.S.C. §§ 4741(a), 4742 and 4744(a), as applied to Petitioner, violate his privilege against self incrimination protected by the Fifth Amendment to the United States Constitution and his rights thereunder as amplified by this Court in three recently decided cases: *Marchetti* v. *United States*, 390 U.S. 39 (1968); *Grosso* v. *United States*, 390 U.S. 62 (1968); and *Haynes* v. *United States*, 390 U.S. 85 (1968).

II. Whether Petitioner was denied due process under the Fifth Amendment by the application, under the circumstances of this case, of the provisions of 21 U.S.C. § 176a, providing that an inference may be drawn respecting the illegal origin and nature of marihuana, and Petitioner's knowledge thereof, solely from the possession of marihuana.

Constitutional, Statutory and Regulatory Provisions Involved

The Constitutional, Statutory and Regulatory provisions involved (Amendment V to the Constitution, 21 U.S.C. § 176a; 26 U.S.C. §§ 4741-44, 4751-55, 4773, and 4775; 26 C.F.R. 152.61-152.68) are set forth in Appendix E at pp. 43a-57a.

Statement

The conviction of Petitioner and the substantial jail sentence he faces arise out of a round-trip automobile journey lasting less than one hour, across the International Bridge connecting Laredo, Texas with Mexico (R. 70, 71, 315).* The testimony upon the trial disclosed that Petitioner, on December 22, 1965, had driven, with four passengers, south across the International Bridge to the Mexican Customs Station and, without leaving the Station, and after apparently being denied entry, returned northward across the bridge (R. 74, 137-38, 315-328). Petitioner was stopped at the American Customs Station on his return and he and the other passengers, including his eighteen year old daughter, were thoroughly searched (R. 74-75, 109, 331-333). Sweepings of marihuana were found in the rented automobile and a small quantity was found on the person of Petitioner's daughter. A total of less than one-half ounce of marihuana was thus discovered (R. 173, 176-185).

Petitioner was charged with (1) violating 21 U.S.C. § 176a—transporting illegally imported marihuana; (2) violating 26 U.S.C. § 4744(a)(2)—transporting or concealing marihuana upon which a transfer tax has not been paid; and (3) smuggling marihuana.

Upon trial, the District Court, over the prosecution's objection, withdrew the charge of smuggling, it being clear that no evidence was presented to justify an inference that Petitioner had acquired the small quantity of marihuana during his short stay in the Mexican Customs Station (R. 4, 593). Rather, the only pertinent testimony disclosed that the marihuana had been acquired by Petitioner in New York (R. 133, 155-156, 313, 349, 357).

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* References in parentheses following the letter "R" are to pages of the Record where the cited material has not been reproduced in full in the Appendix.

It was urged on behalf of Petitioner that the same reasoning applicable to the dismissal of the smuggling count, *i.e.*, his lack of importation of marihuana, should serve to compel the withdrawal of the transportation charge. The District Court, however, in its charge to the jury, took the position that Petitioner's testimony that he had knowingly possessed marihuana during the trip to Mexico, together with the presumption of illegal importation which arises from mere possession under 26 U.S.C. § 176a formed a sufficient basis for conviction (App. F, 102a-104a).

In connection with this presumption of illegal importation arising solely from the possession of marihuana, Petitioner specifically denied any knowledge as to whether the marihuana was imported or was grown domestically. In addition to urging the basic unfairness and incriminatory nature of the presumption Petitioner also attempted to show its arbitrary and irrational nature through testimony —both of Petitioner's witnesses and of a government witness—as to the widespread growth of marihuana and as to the quantity of domestically grown marihuana as opposed to imported marihuana (R. 164-165, 185-187, 496-502, 516-517). The District Court, however, while affirmatively conceding that marihuana is readily grown in the United States (R. 187), refused to allow any detailed testimony as to the relative quantity thereof (R. 165, 517).

With respect to the tax provisions contained in Title 26 of the U.S. Code, Petitioner, in his motion for a new trial, asserted that the statutes violated his constitutional privilege against compulsory self-incrimination (R. 651).

On appeal, the Court of Appeals for the Fifth Circuit, affirmed the judgment of conviction in all respects (App. A, 1a-36a). During the pendency of a petition for rehearing, the Court rendered its decisions in *Marchetti* v. *United States*, 390 U.S. 39 (1968); *Grosso* v. *United States*, 390 U.S. 62 (1968); and *Haynes* v. *United States*, 390 U.S. 85

(1968). The Court of Appeals denied the Petition for Rehearing (App. B, 37a-40a).

The Court granted *certiorari* on June 10, 1968, limited to the two questions presented.

Summary of Argument

I. *Marchetti* v. *United States,* 390 U.S. 39, *Grosso* v. *United States,* 390 U.S. 62, and *Haynes* v. *United States,* 390 U.S. 85, are applicable to the provisions of 26 U.S.C. §§ 4741(a)(2), 4742 and 4744(a).

These provisions require a person, whose possession of marihuana is a crime under state law: (1) to request an order form from the Secretary of the Treasury indicating therein an intention to acquire marihuana, and (2) to pay a tax upon the acquisition of such marihuana. The information thus supplied is available to federal, state, and local law enforcement officers. Requiring an individual, upon pain of criminal sanction, to take action which may directly give rise to criminal prosecution against him violates his privilege against self-incrimination—which privilege becomes available to him as a substantive defense to prosecution. Petitioner has not waived his privilege.

The trial judge's charge allowed the jury to convict Petitioner of a violation of § 176a based upon his failure to pay the transfer tax required by § 4741. Thus, irrespective of the Court's ultimate determination of Question II, a determination reversing Petitioner's conviction under § 4744 must also serve to require a reversal of his conviction under § 176a.

II. Petitioner was denied due process by the application of the presumption contained in 21 U.S.C. § 176a, in lieu of evidence of the elements essential to a finding that he had violated the provisions of that section.

In view of the fact that marihuana is widely grown throughout the United States, the presumption that any particular quantity of marihuana is imported is conjectural and arbitrary and thus fails to comport with the standards established by the Court in *Tot* v. *United States*, 319 U.S. 463 (1943).

In the alternative, as construed and applied by the courts below to the circumstances of this case, the presumption eliminated the statutory elements of illegal importation and knowledge thereof from the statute and turned Petitioner's trial into a test of the legality of his possession rather than a trial of the crime charged.

ARGUMENT

I. The Fifth Amendment privilege against self-incrimination bars conviction under 26 U.S.C. § 4744 (a) for failure to pay the tax imposed upon a transferee of marihuana.

A. The Self-Incriminatory Nature of the Statutes Under Which Petitioner Was Convicted

The issue is not whether marihuana taxes may be validly imposed and collected, but whether the privilege against self-incrimination provides a full defense to a prosecution for failure to pay the $100 per ounce transfer tax. It is submitted that the statutory scheme whereunder Petitioner was convicted is predicated upon self-incriminatory conduct to no less a degree than the statutory schemes involved in *Marchetti* v. *United States*, 390 U.S. 39 (1968); *Grosso* v. *United States*, 390 U.S. 62 (1968); and *Haynes* v. *United States*, 390 U.S. 85 (1968). Under the laws of virtually every state, including New York and Texas, the

mere possession or control of marihuana is a crime;[1] and under federal law, such possession is sufficient evidence to authorize conviction under 21 U.S.C. § 176a, or at the minimum (if Point II herein is upheld) such possession "would surely prove a significant 'link in the chain' of evidence tending to establish . . . guilt" (*Marchetti v. United States, supra,* at 48).

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[1] See, e.g., Ala. Code, Tit. 22, §§ 256-258 (1958); Alaska Stat. §§ 17.10.010-17.10.240 (1962); Ariz.Rev.Stat. §§ 36-1001 to 36-1024 (1956); Ark.Stat. §§ 82-1001 to 82-1024 (1947); Cal.Health and Safety Code, §§ 11001-11853 (1964); Colo.Rev.Stat. §§ 48-5-1 to 48-5-22 (1953); Conn.Gen.Stat. §§ 19-244 to 19-268 (1958); Del.Code Ann., Tit. 16, §§ 4701-4722 (1967); Fla.Stat.Ann. §§ 398.01-398.24 (1963); Ga.Code Ann. §§ 42-801 to 42-822, 42-9917 to 42-9919 (1957); Hawaii Rev.Laws §§ 52-10 to 52-39 (1955); Idaho Code §§ 37-2301 to 37-2323 (1957); Ill., S.H.A., c. 38, §§ 22-1 to 22-49 (1964); Ind.Stat.Ann. §§ 10-3501 to 10-3552 (1956); Iowa Code Ann. §§ 204.1-204.25 (1946); Kan.Stat. Ann. c. 65, Art. 25 (1963); Ky. Rev.Stat. §§ 218.010-218.240 (1962); La. Stat.Ann. 40:961-40:984 (1951); Me.Rev.Stat.Ann., Tit. 22, §§ 2361-2380 (1964); Md.Ann.Code, Art. 27, §§ 276-306 (1957); Mass.Ann.Laws, c. 94, §§ 197-217E (1957); Mich.Comp.LawsAnn. §§ 335.51-335.77 (1961); Minn.Stat.Ann. §§ 618.01-618.25 (1963); Miss.Code Ann., Tit. 25, c. 2 (1942); Mo.Rev.Stat.Ann., c. 195 (1959); Mont.Rev.Codes Ann. §§ 54-101 to 54-128 (1947); Neb. Rev.Stat. §§ 28-451 to 28-472.01 (1943); Nev.Rev.Stat. § 453.010 et seq. (1963); N.H.Rev.Stat.Ann., c. 318-A, §§ 1-26 (1964); W.J. (1953); N.Y. Penal Law, §§ 220.00-220.45 (1967); N.C.Gen.Stat., c. 90, Art. 5 (1958); N.D.Cent.Code Ann. §§ 19-03-01 to 19-03-32 (1960); Ohio Rev.Code, §§ 3719.01-3719.36, 3719.99 (1953); Okla. Sta.Ann., Tilt. 63 §§ 466-469A (1963); Ore.Rev.Stat., Tilt. 37, c. 474 (1967); Pa.Stat.Ann., Tit. 35, §§ 780-1 to 780-31 (1964); R.I. Gen.Laws Ann. §§ 21-28-1 to 21-28-66 (1956); S.C.Code Ann. §§ 32-1461 to 32-1495 (1962); S.D.Code, Tit. 22, §§ 1301-1324 (1939); Tenn.Code Ann. §§ 52-1301 to 52-1323 (1966); Vernon's Ann.Tex.Pen.Code, Art. 725b (1961); Utah Code Ann. §§ 58-13-1 to 58-13a-48 (1953); Vt.Stat.Ann., Tit. 18, §§ 4141-4163 (1959); Va.Code Ann., Tit. 54, §§ 487-519 (1950); Wash-Rev.Code §§ 69.33.220-69.33.960 (1959); W.Va.Code Ann. §§ 16-8A-1 to 16-8A-26 (1961); Wis.Stat.Ann. §§ 161.01-161.25 (1957); Wyo.Stat. Ann., Tit. 35, §§ 348-371 (1957).

As the Court said in *Grosso*: ". . . the validity under the Constitution of criminal prosecutions for willful failure to pay the excise tax may properly be determined only after assessment of the hazards of incrimination which would result from 'literal and full compliance' with all the statutory requirements", 390 U.S. at 65.

1. The Statutory Scheme

A transfer tax is imposed "upon all transfers of marihuana" required to be effected with a written order form (§ 4741). Every transfer, except for a limited number of clearly lawful tranfers[2], must be effected with such an order form. These forms, executed by the transferee, must contain the name and address of the transferor and the transferee, and the amount of marihuana involved (§ 4742).[3] A copy of the order form is "preserved" in the internal revenue district, may be inspected by or furnished to state and local law enforcement officers, and "shall be admissible in evidence as an original" (§§ 4742, 4773).

Section 4744(a)(2), upon which Petitioner's conviction was based, makes it unlawful for a transferee "required to pay the transfer tax" to "transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana . . . acquired or obtained" without payment of the transfer tax. Possession of any marihuana and failure, on demand, to produce the order form is "presumptive evidence of guilt" and of liability for the transfer tax (§ 4744).

---

[2] See § 4742(b) (App. E, pp. 45a-46a).

[3] In addition to the information required by § 4742(c), the application must show "if registered, the (transferee's) registration number" and "a description, including quantities, of the desired articles or materials to be transferred" (26 C.F.R. 152.66). The transferee's copy of the form must be retained by him "and preserved for a period of two years so as to be readily accessible to inspection" by said law enforcement officers (§§ 4742(d), 4773).

There is a sharp distinction in transfer tax rate based upon whether the transferee has registered and paid a special tax: a registered transferee pays a transfer tax of $1 per ounce; an unregistered transferee pays a transfer tax of $100 per ounce. The special tax is imposed annually as follows: $1 upon lawful occupational possessors; $24 upon manufacturers; and $3 upon "person(s) not otherwise taxed"—"who deals in, dispenses . . . or gives away marihuana" (§ 4751). "Any person" subject to the special tax must register with his local internal revenue district. Upon demand a registrant must provide the Secretary with a return, "verified by affidavits", setting forth for a three month period the quantities of marihuana received by registrant, the transferors and the dates of receipt (§ 4754). It is unlawful for any person required to register and pay the special tax to fail so to do (§ 4755). The written order forms and the registrant returns are available for inspection by federal, state and local prosecutors (§ 4775). The Secretary may furnish, to any person, a list of all special taxpayers upon payment of $1 for each 100 names or fraction thereof (§ 4777).

It is from this broad statutory tax scheme that the Government has, in recent years, collected total taxes as follows: 1960, $50,000; 1961, $48,000; 1962, $49,000; 1963, $68,000; 1964, $94,000; 1965, $77,000; 1966, $129,000; and 1967, $177,000 (Reports of the Commissioner of Internal Revenue, 1960-1967).

2. Possible Constructions of the Statutory Scheme

There are three possible constructions of this statutory scheme as applied to persons whose proposed possession of marihuana is probably unlawful:

(1) the special tax and registration provisions do not apply, but before acquiring marihuana such a transferee must obtain an order form and pay the $100 per ounce transfer tax; or

(2) all provisions must be complied with, *i.e.*, persons whose possession is probably unlawful, must pay the $3 per year special tax, register, and upon each acquisition of marihuana obtain an order form and pay the $1 per ounce transfer tax; or

(3) none of the provisions apply except for the criminal sanctions of Section 4744.

The choice between construction "1" and construction "2" depends upon the interpretation of the special tax category of "persons not otherwise taxed" (§ 4751(5)). If only possessors in lawful occupational groups not otherwise specifically mentioned are considered "persons not otherwise taxed," then unlawful possessors cannot pay the special tax and consequently cannot register, and construction "1" applies. If *all* possessors who are not in the occupational categories specifically mentioned in the special tax provision are considered "persons not otherwise taxed" then unlawful possessors must register and pay the special tax, and construction "2" applies. Construction "3" is discussed only because it is the Government's construction.

3. *Incriminatory effect if registration and special tax inapplicable but transfer tax applicable to illegal possessors*

If the registration and special tax provisions do not apply to persons whose proposed possession is or is likely to be unlawful, the sharp distinction in rate of tax in § 4741 becomes crucial. Persons whose possession of marihuana is clearly lawful pay the *$1* per ounce tax mandated by subdivision "1". Persons—including Petitioner—whose possession of marihuana is or is likely to be unlawful are required to pay the *$100* per ounce tax, thus incriminating themselves in clear and unmistakable fashion. So marked and specially designated, the $100 taxpayer, must concurrently obtain a written order form and provide incrimi-

natory information therein—which information is available to state and local law enforcement officers.

4. Incriminatory Effects if all Provisions Apply to Illegal Possessors

If the registration and special tax provisions are applicable to persons whose proposed possession is unlawful appreciable, if different, hazards of incrimination exist.[4] Under this construction, all lawful occupational possessors would pay an annual special tax of either $1 or $24, and the catch-all category of "other persons" with its exclusive $3 a year badge would apply to unlawful possessors (§ 4751). (It is unlawful for any person required to register and pay the special tax to fail to do so (§ 4755)).

For the "privilege" of paying the $1 per ounce rather than the $100 per ounce transfer tax, Petitioner is subjected to the following real and appreciable hazards of incrimination in addition to the written order form requirement:

(1) he must register (§ 4753(a));

(2) he must, at the Government's request, provide a return "verified by affidavits" setting forth his receipts, in any prior 3 month period, of marihuana, the quantities, the transferors, and the dates thereof (§ 4754);

(3) his returns are available to federal, state and local prosecutors (§ 4773);

(4) "any person" may obtain a governmentally certified copy of his name (§ 4775).

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[4] Since Petitioner was convicted for failure to pay the $100 per ounce transfer tax (§ 4741(a)(2)) and was not charged with failure to register and pay the special tax, it may not be essential for the Court, at this time, to decide whether all provisions of the statutory scheme must be complied with or whether only the order form and $100 per ounce transfer tax provisions must be complied with by persons whose proposed possession is probably unlawful.

5. *The Government's Statutory Construction: No provisions apply to illegal possessors except criminal sanctions*

In its Brief in Opposition to the Petition for Certiorari, the Government stated that its position is and always has been that unlawful possessors *cannot pay the transfer tax, cannot obtain order forms* and cannot register and pay the special tax (pp. 7-9). This statutory construction is inconsistent with both the legislative history and the plain meaning of the Marihuana Tax Act.

The Act was purposely drafted so as to permit *anyone* to obtain marihuana—provided he obtains an order form and pays a transfer tax.[5] To accomplish this objective

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[5] The drafters of the Act were concerned that if the Act were drafted so as to *preclude* transfers to persons whose possession was illegal the Act might be declared unconstitutional as an invalid attempt by Congress to regulate a subject matter reserved to the states. Clinton M. Hester, Assistant General Counsel to the Department of the Treasury in his testimony before the House Ways and Means Committee stated as follows:

> "[I]n order to obviate the possibility of a similar attack upon the constitutionality of this bill, it, like the National Firearms Act, permits the transfer of marihuana to nonregistered persons upon the payment of a heavy transfer tax. The bill would permit the transfer of marihuana to anyone, but would impose a $100 per ounce tax upon a transfer to a person who might use it for purposes which are dangerous and harmful to the public, just as the National Firearms Act permits a transfer of a machine gun to anyone but imposes a $200 tax upon a transfer to a person who would be likely to put it to an illegal use. . . .
>
> A person who wants to buy marihuana would have to go to the collector and get an order form in duplicate, and buy the $100 tax stamp and put it on the original order form there. He would take the original to the vendor, and keep the duplicate. If the purchaser wants to transfer it, the person who purchases the marihuana from him has to do the same thing and pay the $100 tax. That is the scheme that has been adopted to stop high-school children from getting marihuana." Hearings on H.R. 6385 before the Committee on Ways and Means; 75th Cong., 1st Sess. at 8, 14 (1937).

§ 4742 requires, without significant exception, an order form for *every* transfer "whether or not [the individual is] required to pay a special tax and register under sections 4751 to 4753. . . ." Section 4741 imposes a tax on "*all* transfers of marihuana which are required by section 4742 to be carried out in pursuance of written order forms. . . ."[6]

If the Government's statutory construction is accepted Petitioner urges summary reversal of his conviction on the following grounds:

(a) The Government has made it a crime and convicted Petitioner of failing to perform an act—payment of the § 4741 tax—which the Government makes it impossible for him to perform;

(b) The indictment which charged that Petitioner was "required to pay the transfer tax imposed by the Internal Revenue Code" (App. F, 60a-61a) was defective for the same reason;

(c) in the alternative, if the crime committed by Petitioner is not the failure to pay the tax but either (1) the act of *transportation,* or (2) the act of *concealment,* of marihuana upon which no order form can

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[6] The application for the order form, by Regulation, provides that "if registered", the transferee shall provide his registration number (26 C.F.R. 152.66), and thus contemplates—by administrative interpretation—nonregistration by certain transferees. Even if the form is not obtained, § 4741 apparently requires that the tax nevertheless be paid by the transferee: "Such transferee shall be liable for the tax imposed by this section but in the event that the transfer is made in *violation of* section 4742 *without an order form* and without payment of the transfer tax imposed by this section, the transferor shall *also* be liable for such tax" (italics supplied).

be obtained nor transfer tax paid (§ 4744(a)(2)).[7] then:

(f) the § 4744 presumption of guilt arising from failure to produce the order form on demand (coupled with possession) is unconstitutional under the due process clause of the Fifth Amendment, because guilt, is presumed in part, based upon a defendant's failure to produce a Government document which the Government consistently refuses to furnish;[8] *or*

(ii) The Trial Judge failed to inform the jury of the impossibility of obtaining the order form and paying the transfer tax and thus of the *immateriality* as to both counts of the indictment of Petitioner's non-payment of the transfer tax; and

(iii) the criminal statute, is inapplicable to Petitioner and persons similarly situated (until

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[7] Section 4744 (a)(2) was added to the Marihuana Tax Act in 1956. The legislative history of that section indicates that transporting or concealing marihuana upon which no tax had been paid, was made a crime merely to facilitate prosecutions for the failure to pay the transfer tax. Under prior law only the acquisition of such marihuana was a crime. Because it was often difficult to prove that the marihuana was obtained in the jurisdiction where the defendant was apprehended, transportation and concealment were also made criminal acts so that venue would lie in both the jurisdiction where possession was discovered and in the jurisdiction where the marihuana was acquired. 1956 U.S. Code Cong. and Adm. News 3274, 76.

[8] In its brief in opposition to the Petition for Certiorari the Government stated as follows:

> "If on the face of an application for an order form it appears that the applicant is not lawfully registered—as would be the case with petitioner—the application and the tax tendered are immediately returned to the applicant" (Government's brief in Opposition to the Petition for Certiorari, p. 8).

the Court adopts said construction) by reason of the due process clause of the Fifth Amendment because the statutory system on its face did not give fair notice of the acts upon which criminal liability would ultimately be predicated.

6. Summary

In summary whatever construction is placed upon this statutory system, the conviction must be reversed. If all provisions of the system must be complied with by Petitioner, then the $1 per ounce tax is not a conclusive badge of criminality, but the payment duly recorded on an order form is an incriminating admission of possession, which admission is "preserved" so as to be available to prosecutors and admissible in evidence. The illegal possessor must register and pay a $3 special tax—a rate reserved only for "persons not otherwise taxed" (§ 4751(5)). Having registered, his name is available to the public on a list of special taxpayers, and he is compelled to supply the government with a verified report—available to prosecutors—of all of his recent receipts of marihuana. If the special tax and registration parts of the system are inapplicable to Petitioner but the transfer tax applies, then the $100 per ounce transfer tax must be paid. Under this construction and its premise that only persons whose possession is or is likely to be lawful can register and pay the special tax—not only is the fact of non-registration and non-payment of the special tax a mark of criminal activity—but the payment of the $100 (not the $1 "lawful") tax serves as a clear clarion call to conviction, duly documented in the written order form furnishable to prosecutors and admissible in evidence. If none of the provisions of the statutory "system" apply except for the criminal sanctions the conviction must be reversed on other grounds.

B. Petitioner Did Not Waive His Privilege by Taking the Stand in His Own Defense.

The Court of Appeals held that Petitioner by taking the stand and explaining his acquisition and transportation of marihuana waived his privilege (392 F.2d at 222). This holding is untenable. Petitioner testified as to the facts surrounding his possession of marihuana because of the presumption of illegality arising from his mere possession of marihuana under 21 U.S.C. § 176a. If defending himself against the importation count amounts to an effective waiver of the privilege with respect to the tax count, then the Fifth Amendment privilege can be destroyed simply by the Government's joinder of an importation count and a tax count.

Further, since the act penalized by § 4744(a) is the failure to take the self-incriminatory action of paying the tax, the privilege is a "full defense to prosecution"[9] rather than merely a right not to take the stand in a judicial proceeding. In this context the Fifth Amendment right is a substantive defense to the action, not a testimonial privilege.

The Government, in its Brief in Opposition to the Petition for Certiorari (pp. 4-6), stated that constitutional protection should be denied Petitioner because he believed the tax to be an unconstitutional imposition upon his religious beliefs and he thus would not have paid the tax even if the statute did not involve self-incrimination. To destroy the constitutional privilege upon such conjecture, is to reduce this fundamental right to nothing more than a procedural nicety.

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[9] *Haynes* v. *United States, supra* at 100.

C. This Court Should Not Attempt to Save the Constitutionality of This Statute by Imposing Restrictions on the Use by State and Local Prosecutors of the Information Obtained as a Consequence of Compliance With the Statutory Scheme.

This statutory scheme cannot be sustained by imposing restrictions upon the use, by federal, state and local authorities, of the information obtained as a consequence of compliance with the statute, *cf. Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964). The disclosure provisions contained in this statute, like the disclosure provisions contained in the wagering statute, are an integral element in the statutory scheme. Furthermore, no weight need be given to the supposed revenue-producing intent of Congress. Since 1952 the Wagering Tax provisions have produced $115 million in taxes.[10] The Court in both *Marchetti* and *Grosso* declined to impose restrictions. During that same period the Marihuana Tax provisions have produced less than $1 million in taxes.[11] In 1956 when Congress amended the Marihuana Tax Act it did not increase the rate of the tax but instead increased the penalties for violating the Statute and otherwise amended the Act to facilitate prosecution thereunder.[12] The only inference is that Congress assessed the "federal treasury" demand in this area

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[10] See the dissenting opinion of Chief Justice Warren in both *Marchetti* and *Grosso*, 390 U.S. at 82-3. Reports of the Internal Revenue Commissioner, 1952-1967.

[11] Reports of the Internal Revenue Commissioner, 1952-67. From 1942-1953 the Government reported the tax receipts from narcotics and marihuana on a combined basis. Therefore the amount indicated in the text is an approximate amount.

[12] The Narcoticcs Control Act of 1956 is described in the 1956 U.S. Code Cong. and Adm. News at pp. 3274, 3276-80.

at a low (if not zero) value, and assessed the federal and state prosecutory demand at a high (if not total) value (*Marchetti* v. *United States, supra,* at 59-60).[18]

D. A Determination in Petitioner's Favor on This Issue Should Serve to Reverse His Conviction on Both Counts.

The trial judge's charge allowed the jury to convict Petitioner of a violation of § 176a based upon his failure to pay the transfer tax required by § 4741. The Trial Judge charged as to § 176a (App. F, 97a-98a):

> "What that means, of course, is this: if the defendant be shown to have had the marihuana in his possession in the United States, such possession shall be deemed sufficient evidence to authorize conviction unless he explains his possession to the satisfaction of the jury. That means, unless he proves to your satisfaction that it was a *lawful and a legitimate* possession of the marihuana which he had." (Italics supplied.)

As will be described below the jury was then instructed that it could find Petitioner's possession not to have been "lawful" and "legitimate" by reason of his failure to pay the transfer tax. That is, the jury was told: (1) that conviction under the importation count (§ 176a) was authorized unless Petitioner proved that his possession was "lawful and legitimate"; and (2) that Petitioner's failure to pay the

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[18] The statute has often been characterized as a criminal statute rather than a revenue raising statute. See *e.g.*, The President's Commission on Law Enforcement and the Administration of Justice: A Task Force Report: Narcotic and Drug Abuse (1967). At page 13 it was stated as follows:

> The Act [The Marihuana Tax Act] raises an insignificant amount of revenue, exposes an insignificant number of transactions to public view, since only a handful of people are registered under the Act. *It has become in effect solely a criminal law imposing sanctions upon persons who sell, acquire, or possess marihuana* (italics supplied).

transfer tax made his possession "illegitimate". Indeed, the Trial Court stated:

> "[W]hen a transfer is made from one person to another such a transfer is taxed—a tax is imposed upon it—and the transferee should, if it be a *legitimate* transfer, receive a so-called order form, which is a form which may be procured from proper government officials to show that the transfer is, *in fact*, a *legitimate* one and that the tax has been paid and the transferee—that is the person who receives it, is obliged to keep that order form in his possession so that if the marihuana be discovered in his custody or in his possession he may show the order form to *show it was legitimate*" (italics supplied, App. F, 98a-99a).

It is respectfully submitted that a decision reversing the conviction under § 4744(a) must, regardless of the Court's determination of the issues presented under Question II, likewise, reverse the conviction under § 176a.

II. Petitioner was denied due process under the Fifth Amendment by the application, under the circumstances of this case, of the provisions of 21 U.S.C. § 176a, providing that an inference may be drawn respecting the illegal origin and nature of marihuana and knowledge thereof solely from possession.

Petitioner was also convicted of violating 21 U.S.C. § 176a—transporting unlawfully imported marihuana.

The essential elements of this crime are: (1) the transportation, or concealment of marihuana; (2) which marihuana has been imported; (3) knowledge of the unlawful importation thereof, and (4) intent to defraud the United States thereby.[14]

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[14] See, e.g., *Harris* v. *United States*, 359 U.S. 19, 23 (1959); *Griego* v. *United States*, 298 F.2d 845 (10th Cir. 1962); *Chaves* v. *United States*, 343 F.2d 85 (9th Cir. 1965), dealing with similar provisions of 21 U.S.C. § 174.

With respect to the proof to be adduced for the purpose of establishing these elements, § 176a provides:

> "Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

Petitioner has maintained that the use of this presumption, in lieu of evidence to establish: (1) the importation of the marihuana, (2) his knowledge of such importation and (3) his intent to defraud the United States, violated his right to due process of law under the Fifth Amendment.

A. The 21 U.S.C. § 176(a) Presumption is Arbitrary and Unreasonable.

The presumption here involved was added to § 176a in 1956. Prior thereto, a conviction under that section of the Marihuana Act could not be sustained in the absence of actual evidence that the marihuana had been imported into the United States and that the defendant knew of such importation. *Symons* v. *United States,* 178 F.2d 615 (9th Cir. 1949). The presumption was added by Congress, apparently without discussion or analysis (see 1956 U.S. Code, Cong. and Adm. News, p. 3274). The language simply copied the identical language relating to other narcotic drugs in 21 U.S.C. § 174. In *Yee Hem* v. *United States,* 268 U.S. 178 (1925), the Court upheld the presumption in § 174 with respect to opium.

The Court has propounded standards of inference and rationality by which such presumptions are to be weighed: "The constitutionality of the legislation depends upon the rationality of the connection 'between the facts proved and the ultimate fact presumed' " *United States* v. *Gainey,* 380 U.S. 63, 66 (1965). See also *Tot* v. *United States,* 319 U.S.

463 (1943). As reiterated recently in *United States* v. *Romano*, 382 U.S. 136, 139 (1965):

> "[A presumption will not be sustained if there is] 'no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. * * * [W]here the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts.' "

Marihuana is totally different from opium and other "exotic drugs": it is widely grown in the United States and can be grown virtually anywhere in the world. At the trial of this case, witnesses for the Government confirmed that marihuana "will grow anywhere in the continental limits of the United States," and in the very county in which the trial took place (R. 165), and that its many varieties are widely grown (R. 186-187). Further expert testimony was introduced that marihuana "grows practically anywhere in the world, except in the Arctic" (R. 516). Indeed, the Trial Judge specifically stated with respect to the growth of marihuana in the United States, that "Nobody denies that . . . We all know it's a fact" (R. 187). The Trial Judge, however, refused to allow evidence with respect to the quantity of domestically grown marihuana (R. 165) and refused to allow testimony as to the comparative proportions of domestic and imported marihuana among users (R. 517).[15] To disregard both the conceded

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[15] It should be noted that, as opposed to "border" situations, where the marihuana has been acquired in what would appear to be an active border area, as that between Texas and Mexico, or in California, the fact is, for purposes of this issue, that Texas as the situs of this case is purely fortuitous. The Trial Judge assumed, and there was no serious dispute of the fact, that the marihuana here involved had been acquired by Petitioner in New York and not in Mexico or Texas (R. 133, 155-56, 313, 345, 357, 593).

fact of domestic growth and to remain blind to evidence of the extent thereof, is in essence to eliminate the importation element from § 176a and turn it into a statute punishing possession of marihuana, *per se*.[16]

In *Yee Hem* v. *United States*, 268 U.S. 178 (1925) the Court sustained a statutory provision making evidence of possession of opium sufficient to authorize conviction for concealing opium knowing it to have been illegally imported. There was no suggestion in the opinion, or in the briefs, of any significant possibility that opium found in this country has been domestically grown; counsel for petitioner pointed only to the possibility of lawful importation, a circumstance which the Court found "highly improbable." *Id.* at 184. As opposed to opium, the most that can be said about any particular quantity of marihuana is that it may or may not be imported.

With the exclusion of expert testimony as to the present comparative growth of domestic marihuana, with the inescapable fact of its ubiquitous nature, and the circumstances under which the specific marihuana was acquired in New York, there can be no constitutional justification, within the standards established by the Court, for the application of the statutory presumption as the *only* evidence of the essential elements of the crime charged.

The irrationality of the presumption may be demonstrated by an analysis of the process of compounding of inference upon inference, drawn from the bare fact of possession. Marihuana is possessed by defendant at a specific

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[16] This has been unequivocally condemned. *Roviaro* v. *United States*, 353 U.S. 53, 63 (1957). See also *Chavez* v. *United States*, 343 F.2d 85, 89 (9th Cir. 1965); *Erwing* v. *United States*, 323 F.2d 674, 679 (9th Cir. 1963); *Griego* v. *United States*, 298 F.2d 845 (10th Cir. 1962).

location in the United States (here, initial possession by defendant was in New York):

> (1) it is more likely than not that the marihuana was imported rather than that the marihuana was domestically grown (as substantial quantities are);
>
> (2) since the marihuana was imported, it is more likely that the importation was "contrary to law" rather than lawful;
>
> (3) since the importation was contrary to law and the marihuana was possessed by defendant, it is more likely that he knew it was imported contrary to law than that he either lacked knowledge on the subject or knew that the marihuana had been domestically grown (notwithstanding that he was the last in a chain of one or more transferees); and
>
> (4) since defendant knew the marihuana had been imported contrary to law and the fact is that he knowingly transported *or* concealed (without distinction between the two) the marihuana, it is more likely than not that he had an "intent to defraud the United States."

The evidentiary and logical gulf between possession of marihuana on the one hand, and illegal importation and knowledge thereof with intent to defraud on the other hand, cannot be rationally bridged by this statutory presumption. Moreover, a standard of reasonable doubt, rather than a test of likelihood should be applied to each of the foregoing inferences.

B. As Construed and Applied by the Lower Courts, Under the Circumstances of This Case, the Presumption Eliminated the Elements of Illegal Transportation and Knowledge Thereof from the Statute.

Even assuming that the Court were to hold that the presumption in § 176a is rational, it is submitted that the Trial Court's construction and application of the presumption to the facts of this case (which was adopted by the Court of Appeals) violates Appellant's right to due process of law under the Fifth Amendment in two respects:

(1) the courts below construed the presumption so that the only defense thereto was proof that possession was "lawful and legitimate" and thus read the requirements of illegal importation and knowledge thereof out of the statute and substantially mandated conviction under the importation count by reason of Petitioner's failure to pay the transfer tax;

(2) the courts below failed to provide any standards or definition of the words "to the satisfaction of the jury", as used in the phrase, "possession is sufficient evidence to authorize conviction *unless the defendant explains his possession to the satisfaction of the jury*" (italics supplied); thus leaving conviction in the uncontrolled discretion of the jury.

1. *Elimination of the elements of illegal importation and knowledge thereof from the statute*

The presumption was construed by the Trial Court as follows:

> "If the defendant be shown to have had the marihuana in his possession in the United States, such possession shall be deemed sufficient evidence to authorize conviction unless he explains his possession to the satisfaction of the jury. That means, unless he proves to your satisfaction that it was *a lawful and a legitimate possession* of the marihuana which he had." (Italics supplied; App. F, 97a-98a)

"[L]egitimate" was construed as follows:

> "The law recognizes that marihuana has some legitimate uses. Doctors, veterinarians, dentists and certain chemists, for experimentation purposes may secure from the proper officials of the United States Government the necessary permit to possess and handle marihuana for those legitimate purposes."
>
> ". . . [W]hen a transfer is made from one person to another such a transfer is taxed—a tax is imposed upon it—and the transferee should, if it be a *legitimate* transfer, receive a so-called order form, which is a form which may be procured from proper government officials to show that the transfer is, *in fact*, a *legitimate* one and that the tax has been paid and the transferee—that is the person who receives it, is obliged to keep that order form in his possession so that if marihuana be discovered in his custody or in his possession he may show the order form to *show it was legitimate.*" (Italics supplied; App. F, 98a-99a)

The Trial Court then applied the presumption to the facts of the case, in part as follows:

> ". . . the evidence from Dr. Leary himself, [was] . . . to the effect that . . . . he knew he had it [the marihuana] in his possession; *he knew it was in violation of the laws of the United States.*" (Italics supplied; App. F, 102a-103a)

No weight nor mention of the fact that the defendant had specifically denied knowledge of the source of the marihuana (App. F, 90a) was made in the Trial Court's construction or application of the presumption to the case. The Trial Court then proceeded to repeat the statutory presumption for the third and fourth times,[17] pointing out that "the Government is entitled to rely upon the presumption. . . . ." (App. F, 103a-104a).

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[17] The trial judge also twice read and once paraphrased without explanation the analogous tax presumption in 26 U.S.C. § 4744 (App. F, 98a-99a, 103a).

As so construed by the courts below and applied to the facts of the case, the presumption deprived Petitioner of his right to defend on the ground that he lacked knowledge of illegal importation. *Chavez* v. *United States,* 343 F.2d 85, 89 (9th Cir. 1965) is particularly relevant:

> "On the other hand, if once the presumption comes into operation, it can be rebutted only by proof of legal importation or *legal* possession, *the element of knowledge of illegal importation has been read out of the statute.* It is just as if, despite the specification of the three essential elements of the crime, no one of which necessarily involves the fact of possession, possession is nevertheless to be regarded, in and of itself, as a violation of the statute, unless proved to have been lawful. Yet this cannot be. In both Harris v. United States, 359 U.S. 19, 23, 79 S.Ct. 560, 3 L.Ed.2d 597, and Roviaro v. United States, 353 U.S. 53, 63, 77 S.Ct. 623, 1 L.Ed. 2d 639, it was expressly held that the statutory presumption does not reduce the offense to one of mere possession. See also, Rodella v. United States, 9 Cir., 286 F.2d 306, 311.
>
> "Moreover, such a reading of the statute would, as the district court recognized, render the presumption in practical effect conclusive."

In *United States* v. *Peeples,* 377 F.2d 205, 210 (2nd Cir. 1967), the Court stated:

> "[T]he jury must determine whether a defendant who is in possession of narcotics has knowledge of their unlawful importation irrespective of whether his possession is lawful or unlawful; ... In determining whether a defendant possessing narcotics had knowledge of their unlawful importation the jury *may,* of course, infer such knowledge from all the evidence before it including the fact of the possession. But the jury must also be left free to believe, if it wishes to believe it, any evidence indicating a defendant's lack of knowledge regardless of whether his possession was lawful; jurors should be instructed to acquit a defendant if satisfied that the defendant did not know the narcotic was imported."

The courts below thus construed and applied the presumption so as to render it in practical effect conclusive: possession is sufficient evidence for conviction unless the defendant shows his possession is "lawful" and "legitimate"; petitioner is not a lawful and legitimate possessor; in fact, he admitted he knew his possession "was in violation of the laws of the United States"; and his denial of knowledge of the source of the marihuana is irrelevant.

2. *Failure to provide guidelines for the words "to the satisfaction of the jury"*

Apart from this unconstitutional construction and application of the presumption, which left the jury little choice other than to convict, the courts below failed to construe the "satisfaction of the jury" phrase so as to provide any standards for its application. As was stated in *Chavez* v. *United States*, 343 F.2d 85, 88 (9th Cir. 1965):

> "The words 'to the satisfaction of the jury,' considered by themselves, provide nothing in the way of a general standard or guide. So far as this language is concerned, each jury would be left at large to decide what it will accept as an explanation of possession sufficient to avoid conviction. But clearly Congress did not intend to leave it to each jury to convict or acquit in accordance with its particular notion as to what kind of an explanation would be acceptable. See Rivera v. United States, 1 Cir., 327 F.2d 791, 792. Nor could such a construction of the statute withstand a constitutional challenge. Courts have therefore found it necessary to give meaning and content to this statutory language by specifying what kind of an explanation a jury may accept as adequate, and what kind it may reject as inadequate."

In summary, as the presumption was construed and applied by the Courts below, the elements of illegal importation and knowledge there were eliminated from the statute and Petitioner was tried on the legality of his possession and not for the crime charged.

CONCLUSION

The judgment below should be reversed in all respects.

Respectfully submitted,

ROBERT J. HAFT,
Counsel for Petitioner.

Of Counsel:
JOEL JAY FINER,
JEROME SIEGMAN.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and rules involved	2
Statement	3
Summary of argument	5
Argument:	
I. The Marihuana Tax Act, as authoritatively and consistently construed and applied, does not compel the disclosure of any information which could be incriminatory	11
A. Introduction—The plan of the statute	13
B. The transfer provisions of the Marihuana Tax Act have been administratively construed as precluding the acquisition of order forms and pre-payment of the transfer tax by non-registrants	16
C. So construed, the Marihuana Tax Act does not contemplate, much less compel, self-incrimination	23
D. Petitioner's other challenges to the Act are insubstantial	25
1. The fact that the government will not accept pre-payment of the transfer tax from an unregistered person does not preclude indictment and conviction for having acquired and transported marihuana without having paid the tax	25
2. There is no unfairness in presuming that a transfer of marihuana was not made in pursuance of an order form if the transferee cannot, upon demand, produce a copy of that form	29

818-985—68——1

Argument—Continued Page

3. The trial court did not erroneously fail to instruct the jury that nonpayment of the transfer tax was immaterial to the government's case 30

4. Petitioner was given fair notice by the statute as to the elements of criminal liability 31

II. In the circumstances, the trial court did not err in charging, pursuant to 21 U.S.C. 176a, that the jury was authorized to convict upon a finding of unexplained possession of marihuana in the United States 31

A. Introduction 31

B. Given his own undisputed testimony showing facts which warranted conviction for transporting and concealing unlawfully imported marihuana, and his failure to object to the alternative theory based on the statutory inference, petitioner cannot now complain about the inclusion of the charge on that alternative theory 33

C. There is a rational connection between the fact of possession of marihuana in the United States and the inferences that the marihuana was imported contrary to law and that the person in possession was aware of such unlawful importation 35

D. Petitioner's other contentions are insubstantial 43

Conclusion 46

Appendix 47

CITATIONS

Cases:

Albertson v. *Subversive Activities Control Board*, 382 U.S. 70 ..... 12, 23

Arrizon v. *United States*, 224 F. Supp. 26 26

Ashwander v. *Tennessee Valley Authority*, 297 U.S. 288 22

Borne v. *United States*, 332 F. 2d 565 38

Browning v. *United States*, 366 F. 2d 420 27

Butler v. *United States*, 273 F. 2d 436 38

Cases:—Continued

	Page
Casey v. *United States*, 276 U.S. 413	35
Caudillo v. *United States*, 253 F. 2d 513, certiorari denied, *sub nom. Romero* v. *United States*, 357 U.S. 931	38
Claypole v. *United States*, 280 F. 2d 768	38
Costello v. *United States*, 324 F. 2d 260, certiorari denied, 374 U.S. 930	38
Crowell v. *Benson*, 285 U.S. 22	22
Doan v. *United States*, 202 F. 2d 674	34
Grosso v. *United States*, 390 U.S. 62	11, 17, 22, 23, 24
Hawes v. *Georgia*, 258 U.S. 1	35
Haynes v. *United States*, 390 U.S. 85	11, 17, 21, 22, 23
James v. *United States*, 366 U.S. 213	29
Luria v. *United States*, 231 U.S. 9	35
Lynch v. *Overholser*, 369 U.S. 705	22
Marchetti v. *United States*, 390 U.S. 39	11, 12, 17, 22, 23, 24
Mobile, J & K. C.R.R. v. *Turnipseed*, 219 U.S. 35	35
Nigro v. *United States*, 276 U.S. 332	17, 27, 28
Pena v. *United States*, 386 F. 2d 181	21
Roseman v. *United States*, 364 F. 2d 18, certiorari denied *sub nom. Copley* v. *United States*, 386 U.S. 918	34
Rossetti v. *United States*, 315 F. 2d 86, certiorari denied, 375 U.S. 814	38
Sonzinsky v. *United States*, 300 U.S. 506	21
Tot v. *United States*, 319 U.S. 463	35
Udall v. *Tallman*, 380 U.S. 1	22
United States v. *Claybourn*, 180 F. Supp. 448	33, 34
United States v. *Covington*, Cr. No. 9041, S.D. Ohio	29
United States v. *Doremus*, 249 U.S. 86	17, 22, 27, 28
United States v. *Fisher*, 353 F. 2d 396	22
United States v. *Gainey*, 380 U.S. 63	35, 36, 37, 41, 43
United States v. *Gibson*, 310 F. 2d 79	38
United States v. *Goldstein*, 168 F. 2d 666	34
United States v. *Guerra*, 237 F. Supp. 1, affirmed, 371 F. 2d 584	19
United States v. *Leary*, 383 F. 2d 851, rehearing denied, 392 F. 2d 220, certiorari granted, 392 U.S. 903	1, 3, 43
United States v. *Roth*, 237 F. 2d 796, affirmed, 354 U.S. 476	34
United States v. *Sanchez*, 340 U.S. 42	19, 21, 22
United States v. *Smith*, 112 F. 2d 83	34
United States v. *Soto*, 256 F. 2d 729	38
United States v. *Taylor*, 266 F. 2d 310, certiorari denied, 374 U.S. 856	38

Cases—Continued

	Page
United States v. *Wong Sing*, 260 U.S. 18	26
Vick v. *United States*, 304 F. 2d 379	30
Webb v. *United States*, 249 U.S. 96	27
William v. *United States*, 290 F. 2d 451	38
Yee Hem v. *United States*, 268 U.S. 178	35, 41, 43

Constitution, statutes and rules:

Fifth Amendment	12
Harrison Anti-Narcotic Act of 1914:	
26 U.S.C. 4705(a)	17
26 U.S.C. 4705(f), (g)	17
Marihuana Tax Act of 1937:	
26 U.S.C. 4741	47
26 U.S.C. 4741(a)(1)	15
26 U.S.C. 4741(a)(2)	2, 4, 11, 15
26 U.S.C. 4741(b)	15, 16
26 U.S.C. 4742	4, 15, 47
26 U.S.C. 4742(b)	15
26 U.S.C. 4742(c)	16
26 U.S.C. 4743	49
26 U.S.C. 4744	49
26 U.S.C. 4744(a)	29, 30
26 U.S.C. 4744(a)(1)	16
26 U.S.C. 4744(a)(2)	2, 3, 11, 16, 45
26 U.S.C. 4751	14, 17, 33, 44, 49
26 U.S.C. 4752	17, 50
26 U.S.C. 4753	14, 51
26 U.S.C. 4771	16, 51
26 U.S.C. 4773	17, 22, 52
26 U.S.C. 4775	17, 52
Narcotic Control Act of 1956	16, 36
Uniform Narcotic Drug Act	14, 23, 38
18 U.S.C. 545	36
18 U.S.C. 4208(b)	3
21 U.S.C. 174	41
21 U.S.C. 176a	2, 3, 8, 9, 31, 32, 34, 35, 43
26 U.S.C. 6107	17, 53
26 U.S.C. 7237(e)	17, 22, 35
26 U.S.C. 7491	19
28 U.S.C. 1254(1)	1
Youth Corrections Act	3
Rule 30, F.R. Crim. P	10, 34, 44
Rule 52(b), F.R. Crim. P	45
Sup. Ct. Rule 23(1)(c)	43

Miscellaneous:

	Page
Buckwalter, *Merchants of Misery*, p. 13 (1956)	39
Bureau of Narcotics, *Report on the Traffic in Opium and other Dangerous Drugs* (for the year ended December 31, 1936) p. 58	22
Id. (for the year ended December 31, 1962), pp. 18, 66	38, 39, 40
Id. (for the year ended December 31, 1963), pp. 17, 78	38, 40
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Id. (for the year ended December 31, 1965), pp. 17, 51	38, 40
Id. (for the year ended December 31, 1966), pp. 9, 45	12, 39, 40
Id. (for the year ended December 31, 1967), p. 43	40
26 C.F.R. Pt. 152	17
26 C.F.R. 152.19	14, 54
26 C.F.R. 152.20	14, 54
26 C.F.R. 152.22	15, 18, 19, 55
26 C.F.R. 152.23	15, 18, 56
26 C.F.R. 152.30	56
26 C.F.R. 152.31	56
26 C.F.R. 152.32	56
26 C.F.R. 152.33	14, 56
26 C.F.R. 152.34	57
26 C.F.R. 152.35	57
26 C.F.R. 152.36	57
26 C.F.R. 152.38	14
26 C.F.R. 152.61	15, 57
26 C.F.R. 152.62	15, 58
26 C.F.R. 152.63	16, 58
26 C.F.R. 152.64	16, 58
26 C.F.R. 152.65	59
26 C.F.R. 152.66	15, 16, 59
26 C.F.R. 152.67	18, 59
26 C.F.R. 152.68	18, 60
26 C.F.R. 152.95	14
26 C.F.R. 152.96	14
26 C.F.R. 152.104	17
26 C.F.R. 152.105	17, 60
26 C.F.R. 152.131	17, 60
2 Fed. Reg. 2054	18
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Hearings on H.R. 6385 before the House Comm. on Ways and Means, 75th Cong., 1st Sess., pp. 9, 14 (1937)	21

Miscellaneous—Continued

	Page
Hearings on Illicit Narcotics Traffic before the Subcomm. on Improvements of the Federal Criminal Code of the Senate Comm. on the Judiciary, 84th Cong., 1st Sess., Pt. I, pp. 17–18 (1955)	37
H. Conf. Rep. No. 2546, 84th Cong., 2d Sess. (1956):	
p. 12	16
p. 14	36
H. Rep. No. 2388, 84th Cong., 2d Sess. (1956):	
p. 1	16
pp. 3, 6	36
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p. 1	13, 21
p. 2	13, 20
pp. 2–3	21
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(For calendar year 1966), p. 10	38
(For calendar year 1967), p. 9	39
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p. 2	13, 21
p. 3	13, 20
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p. 7	36
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9B Uniform Laws Ann.:	
pp. 409, 410	14
§§ 3–7	14
§ 3	38

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 65

TIMOTHY F. LEARY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals affirming the judgment of the district court is reported at 383 F. 2d 851. The opinion denying a petition for rehearing and rehearing *en banc* is reported at 392 F. 2d 220.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 1967. A petition for rehearing or rehearing *en banc* was denied on March 29, 1968. The petition for a writ of certiorari was filed on April 27, 1968. Certiorari was granted June 10, 1968, limited to the two questions listed below. 392 U.S. 903. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the provision of the Marihuana Tax Act (26 U.S.C. 4744(a)(2)) prohibiting the transportation or concealment of marihuana by a person who acquired the drug without paying the transfer tax (26 U.S.C. 4741(a)(2)) violates petitioner's privilege against self-incrimination when the Act is administered and applied so as not to permit prepayment of the tax by those whose handling of marihuana would otherwise be unlawful.

2. Whether, in the circumstances of this case, petitioner was denied due process by the application of the provision of 21 U.S.C. 176a, that proof of possession of marihuana may be sufficient evidence to authorize conviction for facilitating the transportation of illegally imported marihuana, with knowledge of its illegal importation.

STATUTES AND RULES INVOLVED

The relevant statutes and rules (26 U.S.C. 4741–4744, 4751–4753, 4771, 4773, 4775, 6107, 7237(e); 26 C.F.R. 152.19–152.20, 152.22–152.23, 152.30–152.36, 152.61–152.68, 152.105, 152.131) are set forth in the Appendix, *infra*, pp. 47–60).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas petitioner was convicted of transporting and concealing fraudulently imported and non-tax-paid marihuana in viola-

tion of 21 U.S.C. 176a and 26 U.S.C. 4744(a)(2).[1] On March 11, 1966, pursuant to 18 U.S.C. 4208(b), he was tentatively sentenced to the maximum punishment, pending completion of a study and recommendation to be used by the court in determining the ultimate sentence. The court of appeals affirmed, 383 F. 2d 851, and denied a petition for rehearing and rehearing *en banc*. 392 F. 2d 220.

The government's evidence showed that at approximately 6:45 p.m. on December 22, 1965, petitioner and four others arrived at the secondary inspection area, Laredo International Bridge, Laredo, Texas. When a customs inspector asked him to unload the baggage, petitioner stated that the five occupants had earlier crossed the bridge to the Mexican Inspection Station, but had been denied permission to enter Mexico until the following morning. After the three male and two female occupants stepped out of the automobile, the inspector noticed what appeared to be marihuana seeds on the floor of the car (App. 62–65). A personal search was then conducted of the five occupants (App. 65–69, 72–74). In the course of a search by a female customs inspector, petitioner's daughter was found to have in her possession a silver snuff box containing semi-refined marihuana and three partially smoked marihuana cigarettes (App. 73–74, 80–81). A search of the automobile revealed addi-

[1] Petitioner's daughter, Susan, who waived jury trial, was convicted of transporting non-tax-paid marihuana (26 U.S.C. 4744(a)(2)), and was sentenced under the provisions of the Youth Corrections Act. Her appeal from that conviction was dismissed on her own motion.

318-985—68——2

tional sweepings of marihuana in the glove compartment of the car and on the front and rear floor boards (App. 68–69, 81).[2] All five occupants were then placed under arrest (App. 70–71). Petitioner again declared that he and his party had been denied permission to enter Mexico (App. 75), but admitted to an inspector that the snuff box was his, that he had given it to his daughter on the Laredo Bridge and told her to get rid of it, and that he had been aware as they crossed into the United States that his daughter still had the marihuana in her possession (App. 74–75, 76, 77–80).[3]

Petitioner testified at trial that he had purchased the marihuana in New York, prior to the trip to Mexico (App. 83, 89–91), and that he had not realized that on their return the car would have to be cleared through American customs and did not learn that his daughter had not gotten rid of "all of the marihuana" until they crossed the border and approached the U.S. Customs shed (App. 84–86). He conceded that "I knew this at all times, that to bring marihuana into the United States was against the law" (App. 90). He also testified that he did not attempt to obtain the order form required by 26 U.S.C. 4742 or pay the tax imposed by Section 4741(a)(2) since he knew that he "couldn't get such a permission * * * because I don't

[2] The weight of the three cigarettes was estimated to be .15 gram; the loose marihuana in the box weighed approximately 11.11 grams (App. 81–83).

[3] Neither petitioner nor his daughter produced, on request, the Treasury order form required to be retained by a transferee of marihuana (App. 74–75).

do research in a laboratory and because I use them [marihuana and other regulated drugs] for religious purposes, and there is no provision in the law for doing it" (App. 86–87).[4] He also explained that he did not believe he was obliged to pay the tax because it conflicted with "the Fifth Freedom"—"the freedom of a man to pursue his inner goals and to expand his own consciousness" (App. 87–88)—and thus constituted an unwarranted infringement upon his freedom of religion (App. 89–90).

SUMMARY OF ARGUMENT

I

A. Petitioner assails his conviction for having acquired and transported marihuana without paying the $100 per ounce transfer tax imposed by the Marihuana Tax Act, on the ground that if he had applied for the order form (a step necessary to payment of the tax), and paid the tax, he would have disclosed incriminatory information. Relying on the recent *Marchetti, Grosso,* and *Haynes* decisions, he contends that the Act unconstitutionally sought to compel self-incrimination. The Marihuana Tax Act, however, has consistently been construed and applied by the Internal Revenue Service and Bureau of Narcotics as precluding acquisitions of order forms and pre-payment of the $100 transfer tax by persons—like peti-

[4] Petitioner also testified: "It's well known that many people have tried to obtain marihuana for research and religious purposes and have not been able to get it" (App. 87). He stated that he himself had unsuccessfully applied for authority to obtain other dangerous drugs (App. 88).

tioner— who are not registered under the Act, and who cannot register because their handling of marihuana would be in violation of state law. The Act does not compel or contemplate disclosures by those whose activities would violate state law. As to such persons, ineligibility to comply with the transfer provisions of the Act constitutes a complete prohibition on handling marihuana. This construction of the Act, which was known to petitioner, is based on Congress' expressed intent to tax and publicize legitimate industrial, medical, and scientific dealings in marihuana on the one hand, and to eliminate completely—through the imposition of prohibitive tax mechanisms—all clandestine and illicit acquisitions for smoking purposes on the other.

B. Since, as petitioner knew, the Internal Revenue Service and Bureau of Narcotics will not accept the submission of applications for order forms and pre-payment of the tax from persons who are not lawfully registered, the provisions of the Marihuana Tax Act under which petitioner was indicted and convicted do not pose "substantial" risks of incrimination. Petitioner was not "compelled" to make incriminatory disclosures by applying for an order form and tendering the transfer tax since, as he testified he had been aware at the time he purchased the marihuana, the administrative agencies will not issue order forms to, or accept pre-payment of the transfer tax from, those persons, like him, who are not registered or registrable. In short, as petitioner realized, the statute simply proscribes a course of

conduct—the acquisition of marihuana by unregistered persons—and in no way compels or even expects or recognizes any attempts to furnish incriminating information. His conviction for violating the ban on handling marihuana does not violate his privilege against self-incrimination.

C. Petitioner's other challenges to the Marihuana Tax Act, so construed, are insubstantial. Although the enforcement agencies will not accept pre-payment of the transfer tax from unregistered persons, it does not follow that the government is estopped from indicting and convicting those who acquire and transport marihuana in violation of the Act. As the legislative history shows, Congress intended—through the imposition of the prohibitive $100 per ounce transfer tax—to curb completely all dealings in marihuana by those persons who could not properly deal in marihuana. Congress may validly decide who can and who cannot qualify to handle a regulated commodity and may punish those who, without the necessary authority or qualifications, nevertheless acquire or transport it.

Permitting an inference from a possessor's failure to produce an order form that a sale of marihuana was made without payment of the tax which is a prerequisite to obtaining the form does not violate due process simply because the government will not issue such forms to unregistered persons. The inference is clearly fair and reasonable in light of common experience. It is no different from an assumption that a driver who is unable to produce an operator's license is not licensed. It would certainly be no defense to

a prosecution for operating a motor vehicle without a license, in such a situation, that the driver was unable to obtain a license because of some physical infirmity which rendered him unqualified. In any event, petitioner testified that he did not pay the tax or obtain an order form.

Although the government will not accept pre-payment of the transfer tax, non-payment of the tax constitutes a statutory element of the crime. The trial court thus properly charged that proof of non-payment was material to the government's case.

Petitioner was adequately warned by the statute that the acquisition and transportation of marihuana without payment of the tax was the predicate of criminal liability. He testified at trial that he knew that the government will not issue order forms to, or accept pre-payment of the transfer tax from, persons, like him, who are not registered. He also testified that he knew that the acquisition and transportation of marihuana without such payment was in violation of the law. His claim of lack of notice, therefore, is insubstantial.

II

A. In the circumstances, the trial court did not commit reversible error in instructing the jury—with respect to the alleged violation of 21 U.S.C. 176a—that unlawful importation and knowledge thereof could be inferred from the proof of possession of marihuana in this country. At trial, petitioner testified that he had purchased the marihuana in New York, transported it to Mexico, and then back into this coun-

try without any declaration at the American customs station. He thus admitted each and every element necessary for conviction under 21 U.S.C. 176a. Although the trial court added an instruction on an alternative theory of guilt that unlawful importation and knowledge thereof could be inferred from possession, petitioner did not object to this instruction. In these circumstances, he cannot now complain that it is impossible to determine which theory the jury accepted in finding him guilty.

B. In any event, the statutory inference is valid. There is a rational connection between the fact of possession of marihuana in this country and the inference that the marihuana was, as known by the possessor, imported contrary to law. When Congress enacted the statute (21 U.S.C. 176a) in 1956, it had before it evidence that, as a result of the strict enforcement of laws against the domestic growth of marihuana, and in light of the relative impotency of the domestic marihuana plant, some 90% of all smoking marihuana used in this country was of foreign origin. Although marihuana can be and is grown domestically, we have found no new evidence which would indicate any decrease in this figure. Indeed, subsequent evidence confirms that state and local laws against growing marihuana are still rigidly enforced, and that the typical marihuana user still clamors for the Mexican variety rather than that grown domestically. Moreover, through the past six years, at least 79% of all seizures of marihuana effected by federal authorities are made at ports and borders of the

United States. Given the fact that overwhelming percentages of smoking marihuana found in the United States are of foreign origin, the trial court did not err in authorizing the jury to accept the statutory inference that unlawful importation and knowledge thereof could be inferred, in the absence of a satisfactory explanation, from proof of petitioner's possession.

C. The trial court did not commit reversible error in instructing the jury that the inference of unlawful importation and knowledge thereof could be negated by a showing that petitioner's possession was "lawful and legitimate". In context, it was obvious to the jury that the trial judge meant, in explaining that a "lawful and legitimate" possession would overcome the inference, that the inference would be negated if petitioner, through testimony or otherwise, successfully demonstrated that the marihuana was not unlawfully imported, or that he was unaware of such importation.

Nor was the instruction vague because the trial judge failed to explain more fully the meaning of the phrase, "unless the defendant explains his possession to the satisfaction of the jury." As we stated above, the trial judge simply meant that if petitioner offered some tenable basis for concluding that the marihuana was not imported, or that he was unaware of its importation, then they should acquit. In light of petitioner's failure to object to the instructions, or to seek the clarification which he now seeks, there is no occasion to reverse. Rule 30, F.R. Crim. P.

ARGUMENT

I. THE MARIHUANA TAX ACT, AS AUTHORITATIVELY AND CONSISTENTLY CONSTRUED AND APPLIED, DOES NOT COMPEL THE DISCLOSURE OF ANY INFORMATION WHICH COULD BE INCRIMINATORY

Count three of the indictment charged that petitioner, a transferee of marihuana "* * * required to pay the transfer tax imposed by [Section 4741(a)(2) of] the Internal Revenue Code, did unlawfully and knowingly transport, conceal and facilitate the transportation and concealment of a quantity of Marihuana, to wit: approximately three (3) ounces of Marihuana (Cannibas Sativa) without having paid the transfer tax imposed by said code, in violation of Section 4744(a)(2), Title 26, United States Code" (App. 60–61). Petitioner challenges his conviction on that count on the ground that application for and acquisition of an order form—a step necessary to payment of the transfer tax—would have incriminated him and thus that the conviction is invalid under the principles set forth in *Marchetti* v. *United States,* 390 U.S. 39; *Grosso* v. *United States,* 390 U.S. 62; and *Haynes* v. *United States,* 390 U.S. 85. As *Grosso* establishes, the validity of this defense turns on an "assessment of the hazards of incrimination which would result from 'literal and full compliance' with all the statutory requirements." 390 U.S. at 65. Thus, the initial inquiry in testing petitioner's claim must be: What was petitioner obliged to do in order to comply fully with the Marihuana Tax Act? Analysis of the statute will demonstrate, we submit, that as au-

318-085—68——3

thoritatively interpreted by the agencies entrusted with its administration (the Internal Revenue Service and the Bureau of Narcotics[5]), this Act differs critically from those considered in the above-cited cases, and in practical effect presents no substantial risk of self-incrimination.

The major premise in the gambling and firearms cases was that the obligations under those statutes to register and pay occupational and excise taxes created a "real and appreciable" risk of incrimination. *Marchetti, supra,* 390 U.S. at 48. As the Court had said earlier in *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70, 79, registration provisions compelling disclosure of incriminating information contravene the Fifth Amendment when the requirements "are directed at a highly selective group inherently suspect of criminal activities." That is not this case. The essential distinction is that the disclosure requirements under the Marihuana Tax Act are directly aimed at the regulation of the *legitimate* market in marihuana, and, as drafted and applied, these provisions presuppose—and apply only to—activities which are otherwise lawful.[6] Those who cannot deal in marihuana lawfully under local law cannot obtain tax-paid order forms from the federal government,

[5] Now, the Bureau of Narcotics and Dangerous Drugs.

[6] As the Bureau of Narcotics explained in its *Report on the Traffic in Opium and Other Dangerous Drugs* for calendar year 1966, in summarizing its regulatory function (p. 9): "Controls on domestic trade in narcotic drugs directly apply to people who handle, sell, or dispense narcotics for *lawful* medical purposes; such as physicians, hospitals, pharmacists, retailers, and others" (emphasis added).

and thus, by definition, those who are permitted to comply with this Act cannot be incriminating themselves.

A. INTRODUCTION—THE PLAN OF THE STATUTE

In enacting the Marihuana Tax Act in 1937 Congress evinced a dual purpose: it intended to raise revenue through occupational and transfer taxes on the trade in marihuana while at the same time discouraging the widespread use of the drug by smokers and addicts.[7] In light of this dual purpose, Congress was careful to distinguish in its control provisions between the authorized market for marihuana and the illicit and clandestine traffic in the drug. Thus, the Senate Committee explained (S. Rep. p. 3):

> * * * the bill is designed, through the occupational tax and the order form procedure, to publicize *legitimate* dealings in marihuana and through the $100 transfer tax to prevent the drug from coming into the hands of those who will put it to illicit uses. [Emphasis added.]

The House Committee Report (H. Rep. p. 2) reflects the same design:

> [A]ll *legitimate* handlers of marihuana are required to pay occupational taxes * * *.
>
> *These* persons, in addition to paying the occupational tax, must register with the collector of internal revenue and file information returns as to their dealings in marihuana. [Emphasis added.]

[7] S. Rep. No. 900, 75th Cong., 1st Sess. 2 (1937) (hereafter "S. Rep."); H. Rep. No. 792, 75th Cong., 1st Sess. 1 (1937) (hereafter "H. Rep.").

In order to achieve this policy, the Act imposes an annual occupational tax on all persons who desire to handle marihuana legitimately (*i.e.*, import, manufacture, produce, compound, sell, dispense, prescribe, administer, or give away) (26 U.S.C. 4751; see, also 26 C.F.R. 152.19).[8] And these legitimate handlers must register with the district director of Internal Revenue (26 U.S.C. 4753; 26 C.F.R. 152.19). Registration and payment of the occupational tax must be renewed annually (26 U.S.C. 4751, 4753; 26 C.F.R. 152.20). Although petitioner, in this Court (compare App. 86–87, 88), expresses uncertainty on the matter (Br. 9–11), it is manifest that these provisions do not extend to illicit handlers like petitioner. The registration requirement imposed by 26 U.S.C. 4753 and the occupational tax requirement imposed by Section 4751 are interdependent: only those subject to the occupational tax need register. And in enumerating the classes of professionals subject to the occupational tax (and thus derivatively to the registration requirement), Section 4751 follows the enumeration of classes of individuals who, under Sections 3–7 of the Uniform Narcotic Drug Act,[9] might lawfully

[8] Contrary to petitioner's present suggestion (Br. 11, 15), the provision of Section 4751(5) is not a "catch-all" in the sense that it purports to impose the "occupational" tax on individuals who acquire or transfer marihuana for smoking or other unsanctioned purposes. As the regulations make clear, this subsection is directed at the registration of legitimate professional dealers—typically wholesale suppliers and pharmacists. See 26 C.F.R. 152.33, 152.95, 152.96. Indeed, the regulations expressly forbid itinerant vending or peddling of marihuana. 26 C.F.R. 152.38.

[9] The Uniform Act had been promulgated in 1932. See 9B Uniform Laws Ann. 409, 410.

manufacture, wholesale, dispense, prescribe, or possess marihuana.[10]

Complementing the professional occupational tax and registration is the transfer tax designed to insure that the commerce in marihuana is confined to lawful registrants. Thus, the Act imposes upon a transferee[11] a tax of $100 per ounce for any transfer of marihuana to a non-registered person (26 U.S.C. 4741(a)(2); 26 C.F.R. 152.61–152.62).[12] To effectuate this same policy, the Act further makes unlawful *any* transfer of marihuana (with irrelevant exceptions), whether to a registrant or non-registrant, unless the transfer is carried out in pursuance of a written order of the transferee on a form issued by the Secretary of the Treasury (26 U.S.C. 4742; 26 C.F.R. 152.66).[13] In order to obtain the order form, which is in turn given to his seller, the prospective transferee must submit to the district director of Internal Revenue an application (Form 679a) stating his name and address and that of the proposed transferor, a description, including the quantity, of the marihuana desired to be obtained,

[10] The regulations make it express that a person may not register unless he can satisfy the director that he is qualified under state law to conduct the business or activity for which registration is sought (26 C.F.R. 152.22–152.23).

[11] In the event that the transfer is made in violation of the Act, the transferor is jointly liable for the tax (26 U.S.C. 4741(b)).

[12] Transfers to registered persons are taxed at a rate of $1 per ounce (26 U.S.C. 4741(a)(1)).

[13] The Act exempts from the transfer tax and order form requirements certain medical, industrial, and governmental transfers. (See 26 U.S.C. 4742(b)(1)–4742(b)(5)).

and the transferee's registry number, if so registered under the applicable provisions. A money order or check to cover the amount of the transfer tax must be remitted with the application (26 U.S.C. 4741(b), 4742(c); 26 C.F.R. 152.63, 152.66). If the application is accepted by the district director, he will affix a stamp—which represents payment of the appropriate tax (26 U.S.C. 4771; 26 C.F.R. 152.63–152.64)—to the order form and send it to the transferee for use in the transaction. Section 4744(a)(1) makes it a crime for any person required to pay the transfer tax to obtain marihuana without having paid the appropriate tax. Section 4744(a)(2)—under which petitioner was convicted—similarly proscribes the transportation or concealment of non-tax-paid marihuana by a person who has failed to pay the required tax.[14]

B. THE TRANSFER PROVISIONS OF THE MARIHUANA TAX ACT HAVE BEEN ADMINISTRATIVELY CONSTRUED AS PRECLUDING THE ACQUISITION OF ORDER FORMS AND PRE-PAYMENT OF THE TRANSFER TAX BY NON-REGISTRANTS

1. Although the Act, on its face, is susceptible of a construction that would sanction sales of marihuana to non-registered persons on payment of the $100 transfer tax, the Internal Revenue Service and Bureau of Narcotics have consistently, since passage in 1937, construed the Marihuana Tax Act *in pari materia* with the Harrison Anti-Narcotic Act of

[14] Section 4744(a)(2) was added as part of the Narcotic Control Act of 1956 in order to facilitate the proof of venue. See H. Conf. Rep. No. 2546, 84th Cong., 2d Sess., p. 12; H. Rep. No. 2388, 84th Cong., 2d Sess, p. 1; S. Rep. No. 1997, 84th Cong., 2d Sess., p. 8.

1914[15] and developed a policy—concededly known to petitioner (App. 87)—of not issuing order forms to those who are not registered, and who cannot qualify for registration because their intended activities would violate state law.[16]

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[15] Under the Harrison Act, 26 U.S.C. 4705(a) provides that transfers of narcotic drugs must be made pursuant to an order form given by the transferee to the transferor. Subsections 4705(f) and (g) expressly provide that such forms will be issued only to those persons who are registered and only for use in connection with a "lawful" business or "legitimate" profession. The constitutionality of these provisions was upheld in *United States* v. *Doremus*, 249 U.S. 86; see, also, *Nigro* v. *United States*, 276 U.S. 332.

[16] The manner in which an application by a non-registrant would be handled by a district director is not clearly defined by statute or regulation. The Internal Revenue Service has advised us that, since it has no record that there has *ever* been such an application by an non-registrant, the Service has never formulated a policy in the form of a regulation or operating procedure for processing such applications. They have pointed out, however, that the only provisions for disclosure of information by district directors are those under 26 U.S.C. 4773 (authorizing the disclosure of the contents of order forms which have been issued to, and returns filed by, persons who *are* registered under the provisions of Sections 4751–4752) and under 26 U.S.C. 4775 (authorizing the disclosure of the names of those who *have* lawfully registered and paid the special occupational tax). See, also, 26 U.S.C. 6107; 26 C.F.R. 152.104, 152.105, 152.131; compare 26 U.S.C. 7237(e). Moreover, they have advised us that, since the decisions in *Marchetti*, *Grosso*, and *Haynes*, district directors have been instructed that if an application for order forms is submitted by a non-registered person, the application should be treated as confidential, and no disclosure made to any enforcement or investigative agencies either of the contents of the application or of the fact that it has been submitted. District directors have been ordered merely to return the application with an explanation to the effect that, since the applicant is not registered, he cannot qualify for an order form.

This administrative construction is reflected in the regulations jointly promulgated by the Commissioner of Narcotics and the Commissioner of Internal Revenue, and approved by the Secretary of the Treasury, in 1937.[17] Article 47 of these regulations [18] provided that applications for order forms were to be signed by the same person signing the application for registration, and Article 48 [19] provided that the signature on the application for an order form was to be compared with that on the application for registration before the application would be honored.[20] The administrative agencies have consistently construed these regulations as limiting the issuance of order forms to those who are registered.[21]

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[17] 2 Fed. Reg. 2054 (1937), now 26 C.F.R. Pt. 152.

[18] 2 Fed. Reg. 2059 (1937), now 26 C.F.R. 152.67.

[19] 2 Fed. Reg. 2059 (1937), now 26 C.F.R. 152.68.

[20] The application for an order form may be signed by a person other than the one who signed the application for registration only if a power of attorney has previously been filed with and approved by the district director. See regulations cited in notes 18–19, *supra*.

[21] In 1964, the regulatory provisions codified in 26 C.F.R. 152.22 and 152.23 were added to make explicit what had always been assumed—that only persons whose business would be lawful under state law can qualify for registration. Section 152.23 provides that the application of any person seeking registration under the Act must show that "under the laws of the jurisdiction in which he is operating or proposes to operate, he is legally qualified or lawfully entitled to engage in the activities for which registration is sought." If the applicant has not previously registered (registration must be renewed annually), his application will be referred by the district director of internal revenue for investigation by the appropriate district supervisor of the Bureau of Narcotics; the district director may not accept the tendered application unless and until the narcotics supervisor informs him "that the applicant is properly

Thus, under the Marihuana Tax Act and implementing regulations, only persons whose handling of marihuana would otherwise be lawful under state or local law are expected—and allowed—to register and pay the occupational tax. Since order forms for authorization of marihuana transactions will be issued only to registrants, only those whose intended acquisition of marihuana would be legitimate under state and local law are allowed to apply for order forms and to tender the transfer tax. Persons who, like petitioner,[22] are neither registered nor qualified to seek registration thus can comply with this Act only by *abstaining* from any involvement with marihuana.[23] As to this class, the Act stands as a direct and absolute federal prohibition against obtaining, concealing, transporting, or transferring marihuana.

2. As noted above, Congress did not use explicit terms, like those employed in the Harrison Act, to proscribe all handling of marihuana by non-registered persons. We suggest, however, that the construction

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licensed or otherwise lawfully entitled to engage in the activity in the internal revenue district in which he seeks registration." 26 C.F.R. 152.22(b).

[22] Under 26 U.S.C. 7491, in the absence of production of evidence by a defendant that he is a marihuana registrant and has complied with the order form requirements, the contrary will be presumed.

[23] Of course, this does not foreclose assessment of the transfer tax upon an unregistered transferee who goes ahead and obtains marihuana without the legal right to do so; substantial revenue is raised in this way. See, *e.g.*, *United States* v. *Sanchez*, 340 U.S. 42; *United States* v. *Guerra*, 237 F. Supp. 1 (D. Colo.), affirmed, 371 F. 2d 584 (C.A. 10) (civil assessments).

placed on the Act by the Internal Revenue Service and Bureau of Narcotics—which we believe avoids any possible conflict with the values protected by the privilege against self-incrimination—effectuates the clear congressional objective and comports with the language of the statute.

In favorably reporting the bill, both the House Committee on Ways and Means and the Senate Committee on Finance stated that the Harrison Act had been a model for the proposed marihuana controls.[24] After explaining that "all legitimate handlers of marihuana" would be subject to the occupational tax and registration provisions, the committees continued:[25]

> In order to raise additional revenue and to prevent transfers to persons who would use marihuana for undesirable purposes, a transfer tax is imposed upon each transfer of marihuana. Upon transfers to registered persons, this tax is $1 per ounce, while, upon transfers to nonregistered persons, who under ordinary circumstances will be the illicit users of marihuana, a heavy tax of $100 per ounce is imposed. * * *
>
> Thus, the bill is designed, through the occupational tax, to publicize legitimate dealings in marihuana, and through the $100 transfer tax to prevent the drug from coming into the hands of those who will put it to illicit uses.

This language underscores the dual objectives sought to be achieved: "to employ the Federal taxing power to raise revenue from the [legitimate] marihuana drug traffic and to discourage the widespread

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[24] H. Rep. p. 2; S. Rep. p. 3.

[25] *Ibid.*

use of the drug by smokers and drug addicts." [26] Congress thus sought to limit marihuana transactions, as with the narcotics traffic under the Harrison Act, to registered persons. And it intended to accomplish this result by imposing a transfer tax on acquisitions by those who are not registered in an amount foreseen to be completely "prohibitive." [27] Why Congress chose to enact the proscription in the form of a prohibitive tax instead of using the same language as used in the Harrison Narcotic Act (see n. 15, *supra*) is not entirely clear. However, as reflected by the House Committee Report,[28] Congress was at that time concerned about the reach of its constitutional powers. It thus chose to frame the proscription in terms of a regulatory tax as it had done in the National Firearms Act which had been, that very same year, upheld against constitutional challenge in *Sonzinsky* v. *United States*, 300 U.S. 506.[29] Moreover, when the Marihuana Tax Act was enacted in 1937, not all of the states had meaningful laws directed towards the illicit handling

[26] H. Rep. p. 1; see S. Rep. p. 2.

[27] *United States* v. *Sanchez*, *supra*, 340 U.S. at 44. This belief proved to be well founded. The Internal Revenue Service has advised us that they have no knowledge of any applications to prepay the $100 per ounce tax. See, also, *Pena* v. *United States*, 386 F. 2d 181, 182 (C.A. 5).

[28] H. Rep. pp. 2–3.

[29] *Hearings on H.R. 6385 before the House Comm. on Ways* and Means, 75th Cong., 1st Sess., pp. 9, 14 (1937), quoted at Petitioner's Br. p. 12, n.5. In holding certain features of the National Firearms Act unenforceable criminally in the face of the privilege against self-incrimination, this Court in *Haynes*, *supra*, expressly reaffirmed what had been decided in *Sonzinsky* about the validity of the use of the tax power for regulatory purposes. 390 U.S. at 98.

of marihuana. See Bureau of Narcotics, *Report on the Traffic in Opium and other Dangerous Drugs* (for the year ended December 31, 1936) p. 58. It was probably in deference to the states that Congress refrained from phrasing the provisions as constituting a direct and categorical ban, preferring instead to establish the substantive policy and administrative machinery for that result. As this Court has recognized, the "severe burden" imposed by the $100 per ounce tax on transfers to non-registrants "implements the congressional purpose of restricting traffic in marihuana to accepted industrial and medicinal channels." *United States* v. *Sanchez, supra,* 340 U.S. at 44; cf. *United States* v. *Doremus,* 249 U.S. 86, 94.

The interpretation of the Act followed consistently for thirty years by the two agencies administering it promotes this expressed legislative goal. Under settled principles, this long-standing construction is entitled to authoritative weight. *Udall* v. *Tallman,* 380 U.S. 1, 16; *United States* v. *Fisher,* 853 F. 2d 396, 397–398 (C.A. 5). It has the added virtue of avoiding serious problems of self-incrimination under *Marchetti, Grosso,* and *Haynes.* See 26 U.S.C. 4773, 7237(e). In urging acceptance of the administrative construction, we follow the salutary rule that "a statute should be interpreted, if fairly possible, in such a way as to free it from not insubstantial constitutional doubts." See *Lynch* v. *Overholser,* 369 U.S. 705, 711; *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 348 (concurring opinion); *Crowell* v. *Benson,* 285 U.S. 22, 62; see, also, *Haynes* v. *United States, supra,* 390 U.S. at 92.

C. SO CONSTRUED, THE MARIHUANA TAX ACT DOES NOT CONTEMPLATE, MUCH LESS COMPEL, SELF-INCRIMINATION [30]

The purpose and effect of the gambling and firearms legislation considered in *Marchetti, Grosso,* and *Haynes,* was noted by this Court to be two-fold: (1) the raising of public revenues; and (2) the securing of information which would assist state and federal authorities in prosecutions for violations of state and federal laws relating to gambling and possession of firearms. This Court found the latter disclosure provisions to be directed at those "inherently suspect of criminal activities." *Marchetti* v. *United States, supra,* 390 U.S. at 47; see, also, *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70, 79. The Marihuana Tax Act, however, differs significantly in purpose and effect from that legislation. As we have seen, *supra,* pp. 13–14, 20–21, in passing this Act, Congress expressly confined its revenue *and* disclosure objectives to what it termed the "legitimate" commerce in marihuana.[31] The prohibitive tax on transfers to non-registrants was intended to end the availability of marihuana for illegal use, and it was never contemplated that persons who sought marihuana for *illicit* purposes would—as they apparently never

[30] Petitioner apparently concedes this proposition (Br. 12–15).

[31] The court below in rejecting petitioner's reliance on *Marchetti, Grosso,* and *Haynes,* apparently relied on a different aspect of this distinction than we do. The court pointed out, accurately in light of the congressional explanation of the Act and its administration, and in light of the provisions in force in all states under the Uniform Act for lawful handling of marihuana, that the Act's disclosure provisions are *not* directed at a class inherently suspect of criminal activity.

have come forward to register or seek order forms by prepaying the transfer tax.

It was not the purpose of Congress in enacting the Marihuana Tax Act to compel an individual such as petitioner "to provide information which would readily incriminate him * * *." *Grosso* v. *United States*, *supra*, 390 U.S. at 66–67. Petitioner's true complaint is not that he must incriminate himself in order to obtain marihuana legally, but rather, that he cannot legally obtain it at all. In petitioner's case "'literal and full compliance' with all the statutory requirements" (*Grosso*, 390 U.S. at 65) compelled him, not to incriminate himself, but to refrain from handling marihuana. Since, as petitioner well knew, it would have been pointless for him to apply for an order form, it is clear that his claim that the information required to be set forth on such a form could be used to prosecute him for future violations of state laws raises only "imaginary * * * hazards of incrimination" (*Marchetti*, 390 U.S. at 53) which cannot relieve him of criminal liability.

Moreover, petitioner cannot reasonably contend that he ran a serious risk of incriminating himself had he applied for an order form or attempted to pay the tax. Any speculation that such a vain attempt might have been communicated to local law enforcement officers cannot, in light of petitioner's own testimony and the procedures of the Internal Revenue Service, be held to support a claim that petitioner was faced with a "real and appreciable" risk of self-incrimination (*Marchetti*, 390 U.S. at 48). Petitioner made it quite clear in his own testimony that—because of his

awareness that he would not have been given an order form, and because of his religious beliefs—he would not have attempted to have obtained the order form and tendered the tax (App. 87). Moreover, as we have stated above, there are no statutes, regulations, or operating procedures which would have required or authorized the district director to disclose such a hypothetical attempt to enforcement officers.

In sum, petitioner knew that the Marihuana Tax Act does not compel, or even allow, incrimination, but simply prohibits acquisitions of marihuana by non-registered persons. Despite this statutory plan, and his apparent understanding of it, petitioner chose to acquire and transport marihuana. He was not convicted for failing to produce incriminatory information, but for deliberately handling marihuana in violation of the law. That conviction does not impinge upon his privilege against self-incrimination.

D. PETITIONER'S OTHER CHALLENGES TO THE ACT ARE INSUBSTANTIAL

Although the relevant question in the petition for a writ of certiorari and this Court's limited grant of the writ raised only the claim that the Marihuana Tax Act violated petitioner's privilege against self-incrimination, petitioner in his opening brief has sought to urge additional attacks on the statute. Even if we assume these contentions are properly before the Court, they are insubstantial and unavailing.

1. *The fact that the government will not accept pre-payment of the transfer tax from an unregistered person does not preclude indictment and conviction for having acquired and transported marihuana with-*

out having paid the tax. As we have shown above, Congress did not expect and the Internal Revenue Service does not permit pre-payment of the $100 per ounce transfer tax by persons who are not registered. The Marihuana Tax Act was, as we have seen, intended to raise revenue from the legitimate market for marihuana. In aid of this revenue-producing aim, the Act prohibits the acquisition and transportation of marihuana by those who would be most likely to introduce the drug into the illicit channels and create a "black market" in the drug where assessment of the tax would be extremely difficult. This Court has already sustained the permissibility of the type of regulatory scheme here presented.

Under its plenary tax and commerce powers, Congress may place preconditions on the sale or purchase of a regulated commodity. See *United States* v. *Wong Sing*, 260 U.S. 18, 21; *cf. Arrizon* v. *United States*, 224 F. Supp. 27 (S.D. Calif.). The transfer tax and order form provisions of the Marihuana Tax Act are such preconditions. There is no fundamental unfairness—and hence no violation of due process—in establishing a class of individuals who cannot meet or satisfy the preconditions and then punishing them criminally for engaging in the regulated activity without the necessary authority. Congress may constitutionally distinguish between persons who are allowed to deal in a regulated commodity and those who are not, in order "to keep the traffic aboveboard and subject to inspection by those authorized to collect the revenue" and "to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandes-

tinely without paying the tax imposed by federal law." *United States* v. *Doremus*, 249 U.S. 86, 94; see, also, *Nigro* v. *United States*, 276 U.S. 332.

The issue is phrased somewhat inaccurately in petitioner's brief, for he has not been convicted for failing to pay a tax which he would not have been allowed to pay; we recognize that the government may not impale a citizen on the horns of such a dilemma. But in this case, the proscribed conduct for which petitioner has been convicted is *transporting marihuana* without having paid the transfer tax. His ineligibility to pre-pay the tax does not excuse his commission of independently forbidden acts. In *Webb* v. *United States*, 249 U.S. 96, this Court was confronted with an argument similar to that petitioner here suggests. The Court nevertheless held that Congress could constitutionally punish the transfer of narcotics to a person who had no order blank for the drugs, even though that person could not "obtain an order blank because not of the class to which such blanks are allowed to be issued." 249 U.S. at 99.[22]

In *Nigro* v. *United States*, *supra*, 276 U.S. at 351–354, the Court rejected another argument similar to that advanced by petitioner. There the question was whether it was within the power of Congress to make it a federal crime to deal in narcotics without using the order form, while making it impossible for un-

[22] Compare *Browning* v. *United States*, 366 F. 2d 420, 422, where the Ninth Circuit rejected an argument that because it was impossible to pay the marihuana transfer tax, an individual could not be punished for violation of the order form limitations of the statute.

registered persons to obtain such a form. Since the order form requirement tends to keep transactions in regulated drugs aboveboard and to confine such transactions to registered dealers readily amenable to tax collection, insistence on order forms, even while denying them to certain classes of individuals, is valid as "genuinely calculated to sustain the revenue features." *Id.* at 354. *Accord, United States* v. *Doremus, supra,* 249 U.S. at 93–94.

In substance and effect, then, the Marihuana Tax Act operates like any other statute regulating eligibility for carrying on a trade or profession. Certainly no one charged, for instance, with practicing law or medicine without a license, or operating a trucking company without a certificate of public convenience and necessity, could be heard to raise as a defense that it would be fundamentally unfair to prosecute him because his lack of qualification for the calling made it *impossible* for him to obtain the license or certificate. Neither can petitioner complain because he is being subjected to the ordinary consequences of handling marihuana without having paid the transfer tax and obtained an order form. Once he proceeded to engage in activities that only those who can satisfy the prerequisites of the statute may perform, he exposed himself to punishment. Even though he was not within the class eligible to comply with the Act's criteria, he had no privilege to go ahead and obtain and transport marihuana.[23]

[23] The analogy to licensing statutes is, we believe, apt. The order form which is issued upon payment of the tax does perform the function of a license. Thus, in *Nigro* v. *United*

There is likewise no substance to petitioner's contention (Br. 13), that under this construction of the Act, the indictment alleging that he was a transferee "required to pay the transfer tax imposed by the Internal Revenue Code" was defective. The offense specified by the statute is, indeed, transportation of non-tax-paid marihuana by "any person who is a transferee required to pay the transfer tax * * *." 26 U.S.C. 4744(a). The government is not arguing, however, and the agencies have never found, that unregistrable individuals like petitioner are not subject to the transfer tax; our position is only that such persons cannot *pre*-pay the tax and obtain an order form to sanction the transaction. But if the transfer is consummated nevertheless, it is a taxable transaction for which the transferee is civilly (as well as criminally) liable.[34] Similarly, for example, it is illegal to embezzle the property of another. But if a person does embezzle, the proceeds of his actions are taxable income. *James* v. *United States*, 366 U.S. 213.

2. *There is no unfairness in presuming that a transfer of marihuana was not made in pursuance of an order form if the transferee cannot, upon demand, produce a copy of that form.* Petitioner's suggestion

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States, *supra* 276 U.S. at 345, the Court viewed the objective of the order form provisions of the Harrison Act as effecting "a kind of registration of lawful purchasers, in addition to one of lawful sellers * * *." Chief Justice Taft, for the Court, continued: "the order form is not a mere record of a past transaction—it is a certificate of legality of the transaction being carried on * * *." 276 U.S. at 351.

[34] Compare *United States* v. *Covington*, Cr. No. 9041, S.D. of Ohio, probable jurisdiction noted, October 21, 1968, No. 366, this Term.

here is that since the government would refuse to issue an order form to a person who is not registered, the statutory inference (based on proof of possession of marihuana and failure to produce a copy of an order form on demand, 26 U.S.C. 4744(a)) is basically unfair.[35] In the circumstances, however, petitioner is in no position to complain; he himself admitted that the transfer was made to him without his acquisition of an order form (App. 86-87, 92). Moreover, this presumption is essentially indistinguishable from the conclusion that a person who is stopped while driving an automobile and is unable to produce an operator's license did in fact operate the automobile without being duly licensed. It would certainly be no defense that he had been refused a license, or could not have obtained one, because of some physical defect or other infirmity.

3. *The trial court did not erroneously fail to instruct the jury that non-payment of the transfer tax was immaterial to the government's case.* Although, as discussed above, Congress, by imposing what it correctly believed to be a prohibitory tax, intended to curb a course of conduct, this does not suggest that non-payment of the tax is immaterial. Indeed, the statuory language specifically makes such failure an element of the crime charged. The trial court therefore properly charged that the jury would have to find such failure in order to convict.

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[35] Petitioner does not, of course, suggest that the inference is irrational. See *Vick* v. *United States*, 304 F. 2d 379, 380 (C.A.D.C.).

4. *Petitioner was given fair notice by the statute as to the elements of criminal liability.* As mentioned above, petitioner testified that he was fully aware that the government would not issue order forms to those who are not duly registered. He also knew that the law prohibits transfers in the absence of the order forms and payment of the tax (App. 86–87). In these circumstances, petitioner cannot fairly argue that he was not adequately forewarned that his conduct would constitute a violation of the law.

Insofar as petitioner claims standing to raise this objection on behalf of "persons similarly situated" (Brief, p. 14), his argument meets with no greater success. The clearly defined elements of the crime of which he stands convicted—being a transferee of marihuana required to pay the transfer tax, who obtained the marihuana without having done so and then concealed and transported it—are unaffected by the question of whether, had he or some other member of the class of illicit users tried to pre-pay the tax, the tax would have been accepted and an order form issued. The statute clearly gives notice that transportation of non-tax-paid marihuana is prohibited.

II. IN THE CIRCUMSTANCES, THE TRIAL COURT DID NOT ERR IN CHARGING, PURSUANT TO 21 U.S.C. 176a, THAT THE JURY WAS AUTHORIZED TO CONVICT UPON A FINDING OF UNEXPLAINED POSSESSION OF MARIHUANA IN THE UNITED STATES

A. INTRODUCTION

Count two charged petitioner with transporting and concealing marihuana with knowledge that it had been imported contrary to law. The trial court submitted

this aspect of the case to the jury on two alternative theories. The first—the "South-North" theory—was based on petitioner's own testimony, as set forth above, that he had purchased the marihuana in New York, and transported it to the Mexican customs station. According to petitioner, after having been denied entry into the interior of Mexico, he drove back across the border, and attempted to drive through customs without declaration of the marihuana which he then knew was in his daughter's possession (App. 86, 91–92).

The second theory—the "North-South" theory—was based partly on petitioner's testimony, and partly on the statutory inference allowed by 21 U.S.C. 176a. Again referring to petitioner's own testimony to the effect that he had purchased the marihuana in New York and had transported it into and through the Southern District of Texas, the trial court instructed the jury that they could find unlawful importation, and knowledge thereof, from the fact of petitioner's possession of the marihuana on his trip to Mexico (App. 97–98, 102–104).[36] No objection was made with regard to the use of the statutory inference.[37]

[36] Under this alternative theory, it would have made no difference that petitioner further testified that he had transported the marihuana into the United States on his return from Mexico.

[37] Petitioner objected to the trial court's failure to advise the jury of the mandatory minimum sentence provided for in 21 U.S.C. 176a. He also asserted that it was error for the trial court to have submitted the "North-South" theory to the jury, not because of the irrationality of the inference, but because the government had not asserted that theory during trial (R. 612, 613–614).

B. GIVEN HIS OWN UNDISPUTED TESTIMONY SHOWING FACTS WHICH WARRANTED CONVICTION FOR TRANSPORTING AND CONCEALING UNLAWFULLY IMPORTED MARIHUANA, AND HIS FAILURE TO OBJECT TO THE ALTERNATIVE THEORY BASED ON THE STATUTORY INFERENCE, PETITIONER CANNOT NOW COMPLAIN ABOUT THE INCLUSION OF THE CHARGE ON THAT ALTERNATIVE THEORY

Even if the inferences of unlawful importation and knowledge thereof could not be sustained, petitioner was not prejudiced by the inclusion of an instruction on that inference. Relying primarily on his defense that, because of his religious beliefs, he was privileged to possess, use, and transport marihuana with impunity, petitioner fully admitted each and every fact necessary to establish all elements of the offense: unlawful importation, knowledge, and concealment and transportation of the marihuana after it arrived in the United States. Accepting as true petitioner's testimony that the marihuana was originally obtained in New York,[28] unlawful importation was nevertheless shown by the evidence that he transported the marihuana back across the border after having been denied entry into the interior of Mexico. Under 26 U.S.C. 4751, marihuana may not legally be brought into the United States except by duly licensed importers—a class to which petitioner obviously does not belong. The entry of the drug from Mexico was therefore "contrary to law" within the

[28] The trial court apparently credited petitioner's testimony to that effect, since it refused to allow a smuggling charge (Count 1) to go to the jury, on the assumption that an article taken out of the United States could not be "*smuggled*" back into this country. *Cf. United States* v. *Claybourn*, 180 F. Supp. 448, 451–452 (S.D. Calif.).

meaning of 21 U.S.C. 176a. Cf. *Roseman* v. *United States*, 364 F. 2d 18, 23–24 (C.A. 9), certiorari denied *sub nom. Copley* v. *United States*, 386 U.S. 918; *United States* v. *Claybourn*, 180 F. Supp. 448, 452 (S.D. Calif.).

In these circumstances, if petitioner had any objection to the alternative "North-South" theory because of its reliance upon the statutory inferences, instead of urging as his sole objection the contention that the government had not previously developed this theory he should have made this objection known to the trial judge so that the judge could have considered whether mention of the inference should have been retained. See Rule 30, F.R. Crim. P. What was said in *United States* v. *Roth*, 237 F. 2d 796, 800 (C.A. 2), affirmed, 354 U.S. 476, is equally applicable here:

> Now he is not in a position to press this objection. Here we have more than a waiver by failure to object. We have in fact an instance of submission of issues to the jury on more than a single ground which might have been separated had the parties so desired. Since no requests for separate verdicts or for withdrawa' of this issue was made, the conviction must stand as supported by the clear evidence * * *.

See also, *Doan* v. *United States*, 202 F. 2d 674, 679 (C.A. 9); *United States* v. *Goldstein*, 168 F. 2d 666, 671–672 (C.A. 2); *United States* v. *Smith*, 112 F. 2d 83, 86 (C.A. 2). Having failed to move for withdrawal of the "North-South" theory on the ground now pre-

sented, petitioner is in no position to complain. The impossibility of ascertaining which approach the jury took in finding him guilty should, in this context, be chargeable to petitioner. This disposition is especially appropriate because his own undisputed testimony sufficed to support conviction under the "South-North" theory, without resort to the statutory inference.

C. THERE IS A RATIONAL CONNECTION BETWEEN THE FACT OF POSSESSION OF MARIHUANA IN THE UNITED STATES AND THE INFERENCES THAT THE MARIHUANA WAS IMPORTED CONTRARY TO LAW AND THAT THE PERSON IN POSSESSION WAS AWARE OF SUCH UNLAWFUL IMPORTATION

In any event, the inference permitted by 21 U.S.C. 176a is constitutional and thus the instruction that proof of possession would authorize return of a guilty verdict was proper. This Court has consistently held that the constitutionality of a statutory inference depends "upon the rationality of the connection between the fact proved and the ultimate fact presumed. *Tot* v. *United States*, 319 U.S. 463, 466." *United States* v. *Gainey*, 380 U.S. 63, 66–67.[39] Stated otherwise, the test is whether Congress, in light of the knowledge and experience available, acted arbitrarily in concluding that a jury could rationally derive from the facts giving rise to the presumption an inference of the

[39] See also, *Mobile, J. & K. C.R.R.* v. *Turnipseed*, 219 U.S. 35, 43; *Luria* v. *United States*, 231 U.S. 9, 25–26; *Hawes* v. *Georgia*, 258 U.S. 1, 4; *Yee Hem* v. *United States*, 268 U.S. 178, 184; *Casey* v. *United States*, 276 U.S. 413, 418.

fact to be presumed. As this Court recognized in *Gainey, supra*, 380 U.S. at 67:

> The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within the specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it.

We submit that, in light of the knowledge before Congress when it enacted the statutory inference, as well as in light of present day experience, it is reasonable to authorize a jury to infer from the unexplained possession of marihuana that the marihuana had in fact been imported contrary to law and that the defendant knew of this. In so stating, we do not suggest that no marihuana is grown in the United States, or that no domestic marihuana reaches the illicit market. We do suggest, however, that the best available evidence adequately supports the Congressional judgment that the great majority of marihuana marketed illicitly in the United States originates from foreign sources and is unlawfully imported.

1. Prior to 1956, prosecutions for the illegal importation of marihuana were brought under the general anti-smuggling statute (18 U.S.C. 545). As part of the Narcotic Control Act of 1956, however, the smuggling and unlawful importation of marihuana were made separate offenses, with increased mandatory minimum sentences.[40] When considering this pro-

[40] S. Rep. No. 1997, 84th Cong., 2d Sess., p. 7 (1956); H. Rep. No. 2388, 84th Cong., 2d Sess., pp. 3, 6 (1956); H. Conf. Rep. No. 2546, 84th Cong., 2d Sess., p. 14 (1956).

posed legislation, Congress was, of course, aware that marihuana could be grown domestically. Speaking to that fact, however, Harry J. Anslinger, who at the time had been Commissioner of Narcotics for over twenty-five years, testified that the illicit production of domestic marihuana had been suppressed satisfactorily; that domestic marihuana was not used in the illicit market because of the relatively short growing season in the United States and the reduced potency of the alkaloid content; and that 90 percent of all marihuana seized in illicit traffic had been smuggled from Mexico.[41] On the basis of this and other similar testimony throughout the voluminous hearings in which state and local law enforcement officers also stated that most illicit marihuana is of Mexican origin, plus evidence dealing with the quantity of seizures at ports and borders, it was wholly reasonable for Congress to allow juries to "accord to the evidence [of possession], if unexplained, its natural probative force." *United States* v. *Gainey, supra,* 380 U.S. at 71. The creation of a statutory inference on this question merely dispenses with the need for cumbersome evidence at each trial of what Congress justifiably concluded could reliably be assumed.

Notwithstanding repeated observations that marihuana can be and is grown in the United States, the courts of appeals have accorded great weight to the congressional finding and have consistently held the

[41] *Hearings on Illicit Narcotics Traffic before the Subcomm. on Improvements of the Federal Criminal Code of the Senate Comm. on the Judiciary,* 84th Cong. 1st Sess., Pt. I, pp. 17–18 (1955).

statutory inference constitutional. *Caudillo* v. *United States*, 253 F. 2d 513 (C.A. 9), certiorari denied *sub nom. Romero* v. *United States*, 357 U.S. 931; *Butler* v. *United States*, 273 F. 2d 436 (C.A. 9); *Claypole* v. *United States*, 280 F. 2d 768 (C.A. 9); *William* v. *United States*, 290 F. 2d 451 (C.A. 9); *Rossetti* v. *United States*, 315 F. 2d 86 (C.A. 9), certiorari denied, 375 U.S. 814; *Costello* v. *United States*, 324 F. 2d 260 (C.A. 9), certiorari denied, 376 U.S. 930; *United States* v. *Soto*, 256 F. 2d 729 (C.A. 7); *United States* v. *Taylor*, 266 F. 2d 310 (C.A. 7), certiorari denied, 374 U.S. 856; *Borne* v. *United States*, 332 F. 2d 565 (C.A. 5); *United States* v. *Gibson*, 310 F. 2d 79 (C.A. 2).

We are aware of no new evidence which would detract from the authoritative findings of Congress. Indeed, additional empirical evidence presently available actually corroborates the findings underlying this inference. Every American jurisdiction still—as in 1956—prohibits the unlicensed growing of marihuana.[42] In tightly enforcing this ban, state and local authorities have eradicated some 11,393 acres of volunteer growth during the years 1962 through 1967.[43] Those

[42] All jurisdictions have adopted legislation patterned after the Uniform Narcotic Drug Act, Section 3 of that Act prohibits the growing of marihuana except under license.

[43] Figures are from the following sources:

1962—Bureau of Narcotics, *Report on the Traffic in Opium and Other Dangerous Drugs* (for the year ended December 31, 1962), p. 18.

1963—*Id.* (for the year ended December 31, 1963), p. 17.

1964—*Id.* (for the year ended December 31, 1964), p. 19.

1965—*Id.* (for the year ended December 31, 1965), p. 17.

1966—*Report of the Government of the United States of America for the Calendar Year 1966 on the Work-*

who have studied marihuana and the marihuana users have found that, in light of the unsatisfactory potency of the domestic plant, explained to Congress by Commissioner Anslinger, the typical marihuana user still prefers the Mexican variety to that which can be grown domestically.[44] Only last year, the President's Crime Commission expressed the same conclusion, finding that: "Most of the marihuana that reaches American users comes from Mexico."[45]

The relevant statistics demonstrate the soundness of this conclusion. The total of marihuana seized at the ports and borders—which law enforcement authorities estimate constitutes 10 per cent of the total actually smuggled into the United States (see App. 92)—has shown significant increase in the past several years. While only 1009 kilograms were seized in 1962,[46] 8,353 kilograms were seized in 1966,[47] and

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ing of the International Treaties on Narcotic Drugs, p. 10 (1966).

1967—*Id.* (for the Calendar Year 1967), p. 9 (1967).

The Bureau of Narcotics has advised us that one acre will yield between 850 and 2000 pounds of marihuana.

[44] See *e.g.*, Rosewear, *Pot: A Handbook of Marihuana*, p. 32 (1967); Simmons, *Marihuana, Myth and Realities*, pp. 73–77 (1967); *Keeping on the Grass*, Newsweek, July 24, 1967, p. 48; Buckwalter, *Merchants of Misery*, p. 13 (1956).

[45] President's Commission on Law Enforcement and Administration of Justice, *Commission Report: The Challenge of Crime in a Free Society*, p. 213 (1967), *id.*, *Task Force Report: Narcotics and Drug Abuse*, p. 3 (1967).

[46] Bureau of Narcotics, *Report on the Traffic in Opium and Other Dangerous Drugs* (for the year ended December 31, 1962), p. 66.

[47] *Id.* (for the year ended December 31, 1966), p. 45.

23,426 kilograms in 1967.[48] Equally significant is the relationship between the marihuana seized at ports and borders and that (which may or may not be of foreign origin) seized in internal traffic. Over the past six years (1962–1967), 79 per cent of all marihuana seized by federal authorities was seized in attempted smuggling through ports and borders into the United States and only 21 per cent was seized in internal traffic.[49] While we believe that this almost four-to-one ratio is sufficient to sustain the statutory inference of illegal importation, we point out in addition that it is likely that much of the marihuana seized internally is not "home grown." On many occasions, customs officials will let marihuana of foreign origin pass through the border in order to ascertain its intended recipient, and when the recipient is arrested, the seizure will be recorded as an internal one. In addition, a great portion of the marihuana seized internally is conclusively shown to have originated from foreign sources, by independent evidence—for example, when wrapped in Mexican newspaper. Moreover, the extensive controls against growing imposed by

[48] *Id.* (for the year ended December 31, 1967), p. 43.

[49] Figures for the various mentioned years are found at the following sources:

Year	Seizures at Borders	Internal Seizures	Source
1962	1,009.48 Kg.	354.10 Kg.	Bureau of Narcotics, *Report on the Traffic in Opium and other Dangerous Drugs* (for the year ended December 31, 1962), p. 66.
1963	1,588.32 Kg.	1336.21 Kg.	*Id.* (for the year ended December 31, 1963), p. 78.
1964	3,589.28 Kg.	672.22 Kg.	*Id.* (for the year ended December 31, 1964), p. 84.
1965	4,144.51 Kg.	1492.73 Kg.	*Id.* (for the year ended December 31, 1965), p. 51.
1966	8,333.53 Kg.	2426.59 Kg.	*Id.* (for the year ended December 31, 1966), p. 45.
1967	23,426.42 Kg.	4488.51 Kg.	*Id.* (for the year ended December 31, 1967), p. 43.

state authorities and the eradication programs carried out thereunder, and the fact that the typical marihuana user still clamors for the Mexican variety—often referred to as "Acapulco Gold"—which gives the better "high" for the price, also support the conclusion that marihuana seized within the United States has been imported.

Given all these factors, we suggest that Congress was fully warranted in concluding that there was a rational connection between the fact of possession and the inference of foreign origin. In sum, the statutory inference here challenged does no more than accord common knowledge and experience "its natural probative force." *United States* v. *Gainey, supra,* 380 U.S. at 71.

2. If we are correct that it is reasonable to infer illegal importation from the fact of possession of marihuana, then it necessarily follows that unexplained possession similarly permits an inference that *the purchaser had knowledge* that the marihuana was imported contrary to law. Referring to the analogous inference dealing with opium (21 U.S.C. 174), this Court observed in *Yee Hem* v. *United States,* 268 U.S. 178, 184:

> * * * Nor do we think the further provision, that possession of such opium in the absence of a satisfactory explanation shall create a presumption of guilt, is "so unreasonable as to be a purely arbitrary mandate." By universal sentiment, and settled policy as evidenced by state and local legislation for more than half a century, opium is an illegitimate

> commodity, the use of which, except as a medicinal agent, is rigidly condemned. Legitimate possession, unless for medicinal use, is so highly improbable that to say to any person who obtains the outlawed commodity, "since you are bound to know that it cannot be brought into this country at all, except under regulation for medicinal use, you must at your peril ascertain and be prepared to show the facts and circumstances which rebut, or tend to rebut, the natural inference of unlawful importation, or your knowledge of it," is not such an unreasonable requirement as to cause it to fall outside the constitutional power of Congress.

So too with marihuana. As shown above, by universal sentiment and policy, the domestic growth of marihuana is rigidly condemned by federal, state, and local legislation, and importation is limited to that for legitimate (non-smoking) purposes. The statute thus cautions the prospective purchaser to "ascertain and be prepared to show facts and circumstances which rebut" the natural and logical inference of importation contrary to law. In view of the high probability that marihuana purchased in the illicit market is of foreign origin and is illegally imported, and the fact that the purchaser is generally the sole repository of the facts showing such origin, it is not unreasonable to permit the jury to assume knowledge of that fact, absent a satis actory explanation.[50]

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[50] Although not assigned in his petition for a writ of certiorari, petitioner now contends (Br. 23) that it is irrational to infer, from the fact of possession, that petitioner transported and concealed the marihuana "with intent to defraud." The

D. PETITIONER'S OTHER CONTENTIONS ARE INSUBSTANTIAL

Petitioner's remaining claims of error relate to the trial court's instructions but are not "fairly comprised" within the questions presented by his petition or the order granting certiorari limited to specified questions. 392 U.S. 903. They are thus not properly before the Court. See Rule 23(1)(c).[51] They are, in any event, devoid of merit.

1. In charging the jury with respect to the statutory inference allowed by Section 176a, the trial court read to the jury the statutory provision that (App. 97–98):

> Whenever on trial for a violation of this subsection [176a], the defendant is shown to have had marihuana in his possession, such possession shall be deemed sufficient evidence as to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

The court then explained (App. 97–98):

> What this means, of course, is this:
>
> If the defendant be shown to have had the marihuana in his possession in the United

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government, however, did not purport to rely on the statutory inference to prove this element. The government's evidence clearly showed—and petitioner fully admitted—that the marihuana was, with his knowledge, concealed in the automobile, and that he attempted to pass through customs without declaring it. The undisputed evidence thus showed that he transported the marihuana with the requisite intent.

[51] In his petition for a writ of certiorari, petitioner did suggest that the presumption created by 21 U.S.C. 176a violated his privilege against self-incrimination. The contention is unsound, see *Yee Hem* v. *United States*, 268 U.S. 178; cf. *United States* v. *Gainey*, 380 U.S. 63, and we assume that by failing to brief the point petitioner has abandoned it or concluded that it is outside the limitations as to the grant of certiorari.

> States, such possession shall be deemed sufficient evidence to authorize conviction unless he explains his possession to the satisfaction of the jury. That means, unless he proves to your satisfaction that it was a *lawful and legitimate* possession of the marihuana which he had. (Emphasis added.)

Petitioner contends that by instructing the jury that a "lawful and legitimate" possession would negate the effect of the statutory inference, the trial court erroneously removed the elements of unlawful importation and knowledge thereof from the jury's consideration. We think it clear, however, that the trial court, in using the terms "lawful" and "legitimate", merely meant that the statutory inference would be negated if petitioner successfully demonstrated, by testimony or otherwise, that the marihuana was imported through legitimate channels, or that he was unaware of the unlawful importation.[52] Although a better explanation might have been used, petitioner did not object to that explanation. See Rule 30, F.R. Crim. P. Elsewhere in his charge, the trial judge made it amply clear that unlawful importation and

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[52] Petitioner asserts (Br. 25) that the trial court then went on to define "legitimate" possession as only that possession which was acquired in compliance with the tax laws of the United States. That explanation of "legitimate", however, was not made with respect to the importation count, but to the count charging petitioner with transporting and concealing non-tax-paid marihuana in violation of 26 U.S.C. 4744(a)(2) (App. 98–99).

knowledge thereof were elements of the crime with which petitioner was charged (See App. 103–104). In these circumstances, there was no plain error affecting substantial rights. See Rule 52(b), F.R. Crim. P.

2. The statutory inference, as applied to petitioner, was not made vague and indefinite because the trial judge did not more fully explain what he meant in charging that the inference authorized conviction "unless the defendant explains his possession to the satisfaction of the jury." It was obvious to all concerned—and petitioner himself sought no further elaboration—that the trial judge was advising the jury that the inference would be overcome if the defendant produced evidence, which they believed, that would show either that the drug was of domestic origin, that it was imported lawfully, or that he was unaware of the origin. In the absence of objection, or a showing of plain error, this belated contention too must be rejected. See Rule 52(b), F.R. Crim. P.

Relying upon his belief in "the fifth freedom"—i.e., "the freedom of a man to pursue his inner goals and to expand his own consciousness" (App. 87–88), petitioner's sole "defense" at trial was that he had both a moral and political right to traffic in and use marihuana in violation of the law. None of the arguments he now falls back upon merits reversal of his convictions any more than his personal conception of his "fifth freedom" sanctioned his knowing transportation of marihuana.

CONCLUSION

The judgment below should be affirmed.
Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

JOHN S. MARTIN, JR.,
PHILIP A. LACOVARA,
Assistants to the Solicitor General.

BEATRICE ROSENBERG,
LAWRENCE P. COHEN,
Attorneys.

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APPENDIX

26 U.S.C. 4741 provides:

(a) Rate.

There shall be imposed upon all transfer of marihuana which are required by section 4742 to be carried out in pursuance of written order forms taxes at the following rates:

(1) Transfers to special taxpayers.

Upon each transfer to any person who has paid the special tax and registered under sections 4751 to 4753, inclusive, $1 per ounce of marihuana or fraction thereof.

(2) Transfers to others.

Upon each transfer to any person who has not paid the special tax and registered under sections 4751 to 4753, inclusive, $100 per ounce of marihuana or fraction thereof.

(b) By whom paid.

Such tax shall be paid by the transferee at the time of securing each order form and shall be in addition to the price of such form. Such transferee shall be liable for the tax imposed by this section but in the event that the transfer is made in violation of section 4742 without an order form and without payment of the transfer tax imposed by this section, the transferor shall also be liable for such tax.

26 U.S.C. 4742 provides in pertinent part:

Order forms.

(a) General requirement.

It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a

written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate.

* * * * *

(c) Supply.

The Secretary or his delegate shall cause suitable forms to be prepared for the purposes mentioned in this section and shall cause them to be distributed to each internal revenue district for sale. The price at which such forms shall be sold shall be fixed by the Secretary or his delegate, but shall not exceed 2 cents each. Whenever any of such forms are sold, the Secretary or his delegate shall cause the date of sale, the name and address of the proposed vendor, the name and address of the purchaser, and the amount of marihuana order to be plainly written or stamped thereon before delivering the same.

* * * * *

(d) Preservation.

Each such order form sold by the Secretary or his delegate shall be prepared to include an original and two copies, any one of which shall be admissible in evidence as an original. The original and one copy shall be given to the purchaser thereof. The original shall in turn be given by the purchaser thereof to any person who shall, in pursuance thereof, transfer marihuana to him and shall be preserved by such person for a period of 2 years so as to be readily accessible for inspection by an officer or employee mentioned in section 4773. The copy given to the purchaser shall be retained by the purchaser and preserved for a period of 2 years so as to be readily accessible to inspection by any officer or employee mentioned in section 4773. The second copy shall be preserved in the records of the internal revenue district.

* * * * *

26 U.S.C. 4743 provides:

The stamps provided in section 4771(a)(1) for marihuana shall be affixed by the Secretary or his delegate to the original order form.

26 U.S.C 4744 provides in pertinent part:

(a) Persons in general.

It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741(a)—

(1) to acquire or otherwise obtain any marihuana without having paid such tax, or

(2) to transport or conceal, or in any manner facilitate the transportation or concealment of, any marihuana so acquired or obtained.

Proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the Secretary or his delegate, to produce the order form required by section 4742 to be retained by him shall be persumptive evidence of guilt under this subsection and of liability for the tax imposed by section 4741(a).

* * * * *

26 U.S.C. 4751 provides:

Imposition of tax.

Every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, prescribes, administers, or gives away marihuana shall before engaging in any of the above-mentioned activities and thereafter on or before July 1 of each year, pay the following special taxes respectively:

(1) Importers, manufacturers, and compounders.

Importers, manufacturers, and compounders of marihuana, $24 a year;

(2) Producers.

Producers of marihuana (except those included within paragraph (4)), $1 a year, or

fraction thereof, during which they engage in such activity;

(3) Physicians, dentists, veterinary surgeons, and other practioners.

Physicians, dentists, veterinary surgeons, and other practioners who distribute, dispense, give away, administer, or prescribe marihuana to patients upon whom they in the course of their professional practice are in attendance, $1 a year, or fraction thereof, during which they engage in any of such activities.

(4) Persons engaged in research, instruction, or analysis.

Any person not registered as an importer, manufacturer, producer, or compounder who obtains and uses marihuana in a laboratory for the purpose of research, instruction, or analysis, or who produces marihuana for any such purpose, $1 a year, or fraction thereof, during which he engages in such activities;

(5) Persons not otherwise taxed.

Any person who is not a physician, dentist, veterinary surgeon, or other practitioner and who deals in, dispenses, or gives away marihuana, $3 a year; *Provided,* That any person who has registered and paid the special tax as an importer, manufacturer, compounder, or producer, as required by paragraphs (1) and (2), may deal in, dispense, or give away marihuana imported, manufactured, compounded, or produced by him without further payment of the tax imposed by this section;

(6) Millers.

Any person who at a mill manufactures or produces from the plant Cannabis sativa L. any fiber or fiber products, $1 a year, or fraction thereof, during which he engages in such activities.

26 U.S.C. 4752 provides:

(a) Computation of tax.

Where a tax under paragraph (1) or (5) of section 4751 is payable on July 1 of any year it shall be computed for 1 year; where any such tax is payable on any other day it shall be computed proportionately from the first day of the month in which the liability for the tax accrued to the following July 1.

(b) Liability in case of activities in more than one place.

In the event that any person subject to a tax imposed by section 4751 engages in any of the activities enumerated in such section at more than one place, such person shall pay the tax with respect to each such place.

(c) Liability in case of more than one activity by same person at same time.

Except as otherwise provided, whenever more than one of the activities enumerated in section 4751 is carried on by the same person at the same time, such person shall pay the tax for each such activity, according to the respective rates prescribed.

26 U.S.C. 4753 provides in pertinent part:

(a) In general.

Any person subject to the tax imposed by section 4751 shall, upon payment of such tax, register his name or style and his place or places of business with the official in charge of the internal revenue district in which such place or places of business are located.

* * * * *

26 U.S.C. 4771 provides in pertinent part:

§ 4771. Stamps.

(a) Method of payment.

(1) Stamps.

The taxes imposed by sections 4701 and 4741 shall be represented by appropriate stamps, to be provided by the Secretary or his delegate.

* * * * *

26 U.S.C. 4773 provides:

§ 4473. Inspection of returns, order forms, and prescriptions.

The duplicate order forms and the prescriptions, including the written record of oral prescriptions, required to be preserved under the provisions of section 4705 (c)(2) and (e), and and the order forms and copies thereof and the prescriptions and records required to be preserved under the provisions of section 4742, in addition to the statements or returns filed in the office of the official in charge of the internal revenue district under the provisions of sections 4732(b) or 4754, shall be open to inspection by officers and employees of the Treasury Department duly authorized for that purpose, and such officials of any State or Territory, or of any organized municipality therein, or of the District of Columbia, or any insular possession of the United States, as shall be charged with the enforcement of any law or municipal ordinance regulating the production of marihuana or regulating the sale, prescribing, dispensing, dealing in, or distribution of narcotic drugs or marihuana. The Secretary or his delegate is authorized to furnish, upon written request, certified copies of any of the said statements or returns filed in the office of any official in charge of an internal revenue district to any of such officials of any State or Territory or organized municipality therein, or the District of Columbia, or any insular possession of the United States as shall be entitled to inspect the said statements or returns filed in the office of the official in charge of the internal revenue district, upon the payment of a fee of $1 for each 100 words or fraction thereof in the copy or copies so requested. * * *

26 U.S.C. 4775 provides:

§ 4775. List of special taxpayers.

The Secretary or any officer or employee des-

ignated by him is authorized to furnish upon written request, to any person, a certified copy of the names of any or all persons who may be listed in the respective internal revenue districts as special taxpayers under the provisions of sections 4721 to 4726, inclusive, section 4702 (a), section 4751, or section 4752, upon payment of a fee of $1 for each 100 names or fraction thereof in the copy so requested. * * *

26 U.S.C. 6107 provides

§ 6107. List of special taxpayers for public inspection.

In the principal internal revenue office in each internal revenue district there shall be kept, for public inspection, an alphabetical list of the names of all persons who have paid special taxes under subtitle D or E within such district. Such list shall be prepared and kept pursuant to regulations prescribed by the Secretary or his delegate, and shall contain the time, place, and business for which such special taxes have been paid, and upon application of any prosecuting officer of any State, county, or municipality there shall be furnished to him a certified copy thereof, as of a public record, for which a fee of $1 for each 100 words or fraction thereof in the copy or copies so requested may be charged. * * *

26 U.S.C. 7237 provides in pertinent part:

* * * * *

(e) Unlawful disclosure of information on returns and order forms.

Any person who shall disclose the information contained in the statements or returns required under section 4732(b) or 4754(a), in the duplicate order forms required under section

4705(e), or in the order forms or copies thereof referred to in section 4742(d), except—

(1) as expressly provided in section 4773;

(2) for the purpose of enforcing any law of the United States relating to narcotic drugs or marihuana, or

(3) for the purpose of enforcing any law of any State or Territory or the District of Columbia, or any insular possession of the United States, or ordinance of any organized municipality therein, regulating the sale, prescribing, dispensing, dealing in, or distribution of narcotic drugs or marihuana,

shall be fined not more than $2,000 or imprisoned not more than 5 years or both. * * *

26 C.F.R. 152.19 provides:

Persons liable.

Liability to payment of special tax and registration attaches to every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, prescribes, administers, or gives away marihuana. As to the liability of a person engaged in one or more of the foregoing activities to several taxes see § 152.29.

26 C.F.R. 152.20 provides:

Manner and time of registration.

Every person required to register pursuant to section 4753 shall execute and file, with the district director for the internal revenue district in which he proposes to engage in any activity mentioned in § 152.19, an application for registration on Form 678 and pay the special tax or taxes enumerated in § 152.29. Form 678 shall be executed by new applicants and approved by the district director before the activity is commenced. Renewal applications shall be executed and filed on or before the succeeding July 1, and annually thereafter as long as liability is incurred. Form 678 may be obtained from the district director. For the purpose of

the special tax imposed by section 4751, Form 678 shall be considered a return.

26 C.F.R. 152.22 provides:

Investigation of applicants other than millers.

(a) All new applications on Form 678 shall be referred by the district director to the appropriate narcotic district supervisor for investigation, report, and recommendation. Renewal applications on Form 678 shall also be referred by the district director to the appropriate narcotic district supervisor for investigation, report, and recommendation, if the district director is in doubt as to the applicant's being lawfully entitled to engage in the activity for which he seeks registration. The provisions of this section shall not apply in the case of any application to which the provisions of § 152.21 apply.

(b) In the case of applications which have been so referred, the district director shall not issue a special tax stamp in connection with any registration until information has been submitted to him, by the narcotic district supervisor, that the applicant is properly licensed or otherwise lawfully entitled to engage in the activity in the internal revenue district in which he seeks registration.

(c) All applications for registration that are referred to the narcotic district supervisor shall be returned by him to the district director with recommendation for approval or disappoval and, in case of disapproval, with a statement annexed concerning applicant's lack of license or qualification, to lawfully engage in the activity for which registration is sought. The application together with any required statement shall be returned to the district director within 10 days from date of receipt of the application by the supervisor, unless a longer time shall be required within which to

complete an investigation. In the latter event the district supervisor shall, upon or before the expiration of the said 10-day period, so notify the district director stating the estimated additional time required.

26 C.F.R. 152.23 provides:

Evidence of qualification.

The application of every person shall show that, under the laws of the jurisdiction in which he is operating or proposes to operate, he is legally qualified or lawfully entitled to engage in the activities for which registration is sought.

26 C.F.R. 152.30 provides:

Importers.

Every person who imports marihuana is subject to tax as an importer at the rate of $24 per annum in Class I. A manufacturer or compounder who is also an importer is not thereby required to pay more than one tax.

26 C.F.R. 152.31 provides:

Manufacturers and compounders.

Every person coming within the definition set out in § 152.11(b) is subject to tax as a manufacturer or compounder at the rate of $24 per annum in Class I.

26 C.F.R. 152.32 provides:

Producers.

Every person coming within the definition set out in § 152.11(c) is subject to tax as a producer at the rate of $1 per annum or fraction thereof in Class II.

26 C.F.R. 152.33 provides in pertinent part:

Dealers.

Generally, one who sells, gives away, or dispenses marihuana in any form, is subject to tax as a dealer at the rate of $3 per annum in Class III. * * *

26 C.F.R. 152.34 provides in pertinent part:

Practioners and interdistrict practice.

(a) Physicians, dentists, veterinary surgeons, and other practitioners, including institutions, who prescribe, distribute, dispense, give away, or administer marihuana, and who are entitled to do so under the laws of the jurisdiction in which they practice, are subject to tax at the rate of $1 per annum or fraction thereof in Class IV.

* * * * * *

26 C.F.R. 152.35 provides:

Laboratory use.

Chemists occupying an independent status and not that of employees, in other words, in business for themselves, who, being lawfully entitled so to do, make analyses of marihuana or use marihuana in analyzing other substances in a laboratory, and persons who produce or obtain and use in a laboratory any marihuana for the purpose of research, instruction, or analysis, if not registered as an importer, manufacturer, compounder, or producer, are subject to tax at the rate of $1 per annum or fraction thereof in Class V, provided no marihuana is manufactured or compounded for sale or for removal for consumption or sale.

26 C.F.R. 152.36 provides:

Millers.

Every person who at a mill manufactures or produces from the marihuana plant any fiber or fiber products is subject to tax as a miller at the rate of $1 per annum or fraction thereof in Class VI.

26 C.F.R. 152.61 provides:

Scope of tax.

Except as otherwise provided, each transfer of marihuana to a person within the United States is subject to tax, to be paid in the manner hereinafter indicated. The tax is due

whether the transferor be located within the United States or elsewhere. The tax applies to every transfer, no matter how often the same material may be transferred. It is no basis of exemption that a transferred article was produced from material on the transfer of which tax was paid.

26 C.F.R. 152.62 provides:

Amount of tax.

Where the transfer is to be a taxable person who has duly registered and paid special tax, the transfer tax is at the rate of $1 per ounce or fraction thereof. If the transfer is to be a person who has not registered and paid the special tax under this act, tax at the rate of $100 per ounce or fraction thereof is due.

26 C.F.R. 152.63 provides:

Method of payment.

The tax is paid by attachment of adhesive stamps to order forms as hereinafter shown. Stamps of various denominations are available. Payment for the stamps shall be made when application for the order form is submitted.

26 C. F. R. 152.64 provides:

Affixing and canceling of stamps.

The proper stamp, evidencing the payment of the transfer tax, shall be affixed to the original order form by the district director or his representative, and the person so affixing the stamp shall cancel it by writing or stamping thereon, in ink, his initials, and the day, month, and year, or shall, by cutting with a machine or punch affix his initials and the date as aforesaid, in such manner as to render it unfit for reuse. The cancellation shall not so deface the stamp as to prevent its denomination and genuineness from being readily determined.

26 C.F.R. 152.65 provides:

Reuse of stamps prohibited.

A stamp once affixed to one order form cannot lawfully be removed and affixed to another. As to refunds for amounts paid for stamps, see § 152.124.

26 C.F.R. 152.66 provides:

Written order required for transfer of marihuana.

Except as otherwise provided, every person seeking to obtain marihuana shall make application on Form 679a (Marihuana) to the district director of internal revenue for the district in which the transferee is located for the purchase of an order form. The application shall show (a) the transferee's name, address, and, if registered, the registration number, (b) the name and address of the transferor, and (c) a description, including quantities, of the desired articles or materials to be transferred. The application must be accompanied by a check, cash, or money order in payment of the transfer tax (see § 152.62), plus 2 cents in payment for the order form.

26 C.F.R. 152.67 provides:

Signing of application.

Generally, applications for order forms shall be signed by the same person or persons signing the application for registration (see § 152.25). However, when it is impracticable for the person signing the application for registration to sign the applications for order forms they may be signed by another person, provided a power of attorney authorizing such other person to sign the applications for order forms has previously been filed with and approved by the district director. The power of attorney shall be executed on Form 1315, or a substantially similar form, in the same manner as applications for registration, shall show the signature

of the person thereby authorized to sign applications for order forms, and shall affirm that the signature as shown is his signature.

26 C.F.R. 152.68 provides:

Signatures to be compared.

Upon receipt by the district director of an application for an order form the signature on such application shall be compared with that appearing on the application for registration or in the power of attorney (see § 152.67). Unless the district director is satisfied that the application is authentic it will not be honored.

26 C.F.R. 152.105 provides:

Records open to inspection.

All order forms, duplicate forms, prescription records, returns, and inventories required under the provisions of subchapter A, chapter 39, relating to marihuana, or the regulations in this part to be kept on file shall be kept so that they can be readily inspected.

26 C.F.R. 152.131 provides:

List of taxpayers.

The list of marihuana special-tax payers required by section 6107, shall be kept on Record 10, and may be inspected and copied in the district director's office at such reasonable and proper times as not to interfere with the district director's use of it, or exclude other persons from inspecting it.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 65

TIMOTHY F. LEARY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE*

JONATHAN SOBELOFF
506 E Street, N. W.
Washington, D. C. 20001
Attorney for American Civil Liberties Union, Amicus Curiae

MELVIN L. WULF
of Counsel

INDEX

PAGE

MOTION 1

Interest of *Amicus* 5

Argument 6

ARGUMENT:

I. The Marihuana Tax Act requires self-incriminatory payment of tax 6

II. As construed by respondent, the Marihuana Tax Act would violate various constitutional and statutory provisions 23

CONCLUSION 28

TABLE OF AUTHORITIES

Cases:

Albertson v. Subversive Activities Control Board, 382 U. S. 70 (1965) 2

Bartol v. United States, No. 21,487 (D. C. Cir.) 2, 8

Browning v. United States, 366 F. 2d 420 (9th Cir. 1966) 24

Commonwealth v. Nelson, 350 U. S. 497 (1956) 27

Griswold v. Connecticut, 381 U. S. 479 (1965) 27

Grosso v. United States, 390 U. S. 62 (1968) 2, 6, 25

PAGE

Haynes v. United States, 390 U. S. 85 (1968) 2, 6, 25

Marchetti v. United States, 390 U. S. 39 (1968) 2, 6, 25

Nigro v. United States, 276 U. S. 332 (1928) 9, 12, 17

Scott v. United States, Crim. App. No. 21,016 (D. C. Cir. April 29, 1968) 27

United States v. Alston, Crim. No. 991-66 (D. D. C. 1968) 22

United States v. Cardiff, 344 U. S. 174 (1952) 24

United States v. Constantine, 296 U. S. 287 (1935) 25

United States v. Covington, S. D. Ohio Crim. No. 9041 (May 6, 1968), Jurisdictional Statement filed, August 1, 1968, No. 366, O. T. 1968 16

United States v. Doremus, 249 U. S. 86 (1919) 17

United States v. Sanchez, 340 U. S. 42 (1950) 10, 14, 17, 20, 26

Constitution:

U. S. Const., art. I, § 8, cl. 1 25

Fifth Amendment 5, 6, 18

Statutes:

5 U. S. C. §§ 551(9), (12), (13) 26

5 U. S. C. § 552(a)(1) 25

5 U. S. C. § 558(c) 26

5 U. S. C. § 1002(a) 25

26 U. S. C. § 176(a) 21

PAGE

26 U. S. C. § 4705(f) 19

26 U. S. C. § 4705(g) 20

26 U. S. C. § 4741(a)(1) 18, 20

26 U. S. C. § 4741(a)(2) 6, 19

26 U. S. C. § 4744(a) 6

26 U. S. C. § 4751 ..... 18, 19, 20

26 U. S. C. § 4773 23

26 U. S. C. § 4906 20

Regulations:

26 C. F. R. § 152.4a (1949) 18

26 C. F. R. § 152.21 18

26 C. F. R. § 152.22 19

26 C. F. R. § 152.23 ..... 19, 20

26 C. F. R. § 152.47 (1938) 18

26 C. F. R. § 152.48 (1938) 18

26 C. F. R. § 152.67 ..... 17, 19

26 C. F. R. § 152.68 ..... 17, 19

29 Fed. Regs. 3758, 3760, 3769 19

Miscellaneous:

Brief of United States in United States v. Sanchez, 340 U. S. 42 ..... 10, 17, 20

Brief of United States in Bartol v. United States, No. 21,487 (D. C. Cir.) 8

PAGE

Bureau of Narcotics, *Report on the Traffic in Opium and Other Dangerous Drugs* (1966) 11

81 Cong. Rec. App. 1440 (1937) 10

81 Cong. Rec. 5689 (1937) 10

Hearings on H. R. 6906 Before the Subcommittee of the Senate Comm. on Finance, 75th Cong. 1st Sess. (1937) 8, 9, 17

President's Advisory Commission on Narcotics and Drug Abuse, *Final Report* (1963) 15, 16

President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Narcotics and Drug Abuse* (1967) 16

S. Rep. No. 2662, 1956 U. S. Code, Cong. & Ad. News 4062, 4067 15

Sobeloff, *The New Freedom of Information Act: What It Means to Tax Practitioners*, 27 J. Taxation 130 (1967) 25

T. Powell, Vagaries and Varieties in Constitutional Interpretation (1956) 26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 65

TIMOTHY F. LEARY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

Motion of American Civil Liberties Union for Leave to File a Brief *Amicus Curiae*

The American Civil Liberties Union moves for leave to file the attached brief as an *amicus curiae* in support of the petitioner. We believe that the Fifth Amendment privilege against self-incrimination would be violated by permitting prosecutions for failure to comply with the registration and tax requirements of the Marihuana Tax Act.

Consent to our filing of a brief *amicus curiae,* has been granted by petitioner, but has been refused by respondent. (Respondent had offered to consent to the filing of such brief if it could be filed at least ten days prior to the September 9, 1968 deadline for the filing of respondent's brief on the merits, but was unwilling to consent when advised that we were unable to meet this condition.)

Respondent in effect does not contest that the Marihuana Tax Act, if applied as written, would violate petitioner's privilege against self-incrimination, as amplified by the recent cases of *Marchetti* v. *U. S.*, 390 U. S. 839 (1968); *Grosso* v. *U. S.*, 390 U. S. 62 (1968); and *Haynes* v. *U. S.*, 85 (1968), applying the principle of *Albertson* v. *Subversive Activities Control Board*, 382 U. S. 70 (1965). On this point, respondent relies entirely on its construction of the Marihuana Tax Act to forbid voluntary payment of the required $100 per ounce excise tax. Petitioner's conviction rests upon his failure to pay such tax. We believe that arguments bearing upon the correctness of the respondent's construction of the statute have not been fully presented. Moreover, the parties have not adequately presented the question whether the conviction may be affirmed even if respondent's construction of the statute were correct. It is relevant to consider here whether the mere attempt to comply with the statute as written would have been incriminatory even though, under respondent's construction, officials of the Government would have been duty bound to frustrate petitioner's attempt to comply. Moreover, it is relevant to consider the question of whether the construction advocated by respondent could be applied without violating various other constitutional and statutory rights of petitioner. We believe that the issue framed as to the Marihuana Tax Act in the grant of certiorari requires consideration of these other rights both in determining the proper construction of the Act, and if the Act is to be construed as respondent contends it should be, in determining the validity of the Act.

The arguments in this brief are largely those on a similar point raised by counsel for appellant in *Bartol* v.

United States (D. C. Cir. No. 21,487) now pending before the Court of Appeals for the District of Columbia Circuit. Counsel for the American Civil Liberties Union in this case is court-appointed counsel for Bartol; and an assistant to the Solicitor General who is of counsel for respondent in this case briefed and argued the case for the United States in *Bartol.*

Our brief is limited to the questions relating to the Marihuana Tax Act, and does not discuss the question relating to the validity of the presumption of importation under the Narcotic Drug Import and Export Act, 21 U. S. C. 176a.

Respectfully submitted,

JONATHAN SOBELOFF
506 E Street, N. W.
Washington, D. C. 20001
Attorney for Movant

IN THE

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No. 65

TIMOTHY F. LEARY,

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—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of *Amicus*

The American Civil Liberties Union files this Brief in the belief that punishment for acquiring marihuana without having paid the $100 per ounce regulatory excise tax under the Marihuana Tax Act, violates the Fifth Amendment privilege against self-incrimination.[1]

[1] Since the brief bears directly on *United States* v. *Covington*, No. 366, we ask the Court to consider the brief in relation to that case as well.

ARGUMENT

I.

The Marihuana Tax Act requires self-incriminatory payment of tax.

Petitioner has argued that, where he asserts his Fifth Amendment privilege against self-incrimination, he cannot be punished for acquiring marihuana without having paid the $100 per ounce regulatory excise tax. This follows, under the recent Supreme Court decisions in *Marchetti* v. *United States*, 390 U. S. 39; *Grosso* v. *United States*, 390 U. S. 621 and *Haynes* v. *United States*, 390 U. S. 85, since payment of the tax would have required petitioner to furnish information which posed a real threat of his prosecution under various federal and state statutes relating to marihuana. Respondent's sole response on this point is to urge that petitioner was *not required* (nor even permitted) *to pay* the tax prior to acquisition of marihuana. This remarkable contention might be answered most directly by merely noting that petitioner has been indicted and convicted for "being a transferee of marihuana *required to pay*" the tax who obtained marihuana without having paid such tax; if he is not "required to pay" he is not guilty.

Respondent's contention was succinctly answered in the opinion of the District Court filed May 6, 1968 on the Government's motion for reconsideration in *United States* v. *Covington*, S. D. Ohio, Crim. No. 9041, Jurisdictional Statement filed, August 1, 1968, No. 366, O. T. 1968. In its order of March 27, 1968, the district court had dismissed an indictment under 26 U. S. C. §4744(a) upon defendant's motion based on *Grosso*, *Haynes* and *Marchetti*. The Gov-

ernment's Memorandum in support of its petition for reconsideration then raised for the first time the same argument raised here by respondent. The Court held as follows:

> The memorandum filed in support of this motion submits that a person who is a transferee of marihuana in violation of state laws will not be issued an order form for marihuana. It is asserted that this rids the statute of any trace of unconstitutionality. This Court did not decide that the marihuana taxing provisions are in themselves unconstitutional; it merely determined that, as applied to this defendant, they would be unconstitutional.
>
> If defendant had no obligation to pay the tax and obtain an order form, the United States had no basis on which to seek an indictment. The Court does not agree that Section 4744 (the statute under which defendant was indicted) is now an absolute prohibition. Section 4744 is based explicitly on Section 4741(a). If 4741(a) is not applicable to defendant, then there is no basis for the indictment. Therefore, in any event, the indictment should be dismissed.

Respondent's picture of the statute, while evidencing imagination and creativity, can only be appreciated as very modern and not of a representational school. The statute, as enacted by Congress in 1937 and, with its 1956 amendment applicable in this case, is entirely different from this picture in its essential features. The government apparently argues (Respondent's Brief at 21-22) that when Congress declared in 1937 that an unregistered individual such as petitioner must pay $100 per ounce tax before acquiring marihuana it was referring only to individuals in states or other local jurisdictions which did not make the acquisi-

tion of marihuana unlawful. (This argument is stated more directly by the government in its brief in *Bartol* v. *United States*, No. 21,487 (D. C. Cir.) at 27-28.) This seems incredible since the Act makes no such reference to state or local law.

Moreover, respondent would have us believe that Congress thought that it could constitutionally *absolutely prohibit* acquisition of marihuana by such individuals in states which prohibited the acquisition. But if this were so, respondent fails to suggest why Congress would not also have used absolute prohibition rather than resorting to the device of the prohibitory tax rate of $100 per ounce, in the states which respondent claims had no "meaningful (*sic*) laws directed towards the illicit handling of marihuana" (respondent's brief, pp. 21-22)—and all without any reference to a distinction based on state law. (Reference to state law would have been unconstitutional. See *infra*, pp. 25, 27.) In fact, Congress would not have bothered with the tax provision at all if it had thought in 1937 that it had the Constitutional power of such absolute prohibition.

This is confirmed by the legislative history. In the Hearings before the Senate Finance Committee, the representative of the Treasury Department stated that,

> The primary purpose of this legislation must be to raise revenue, because we are resorting to the taxing clause of the Constitution and the rule is that if on the face of the bill it appears to be a revenue bill, the courts will not inquire into any other motive that Congress may have had in enacting this legislation.

Hearings on H. R. 6906 Before the Subcomm. of the Senate Comm. on Finance, 75th Cong., 1st Sess. 8 (1937) (Statement of Clinton M. Hester, Ass't General Counsel for the

Treasury Dep't). See also the similar quotation from Mr. Hester's testimony before the House Ways and Means Committee, Petitioner's Brief at 12. The representative of the Treasury Department further testified as to the Department's concern with the 5-4 Supreme Court decisions upholding the Harrison Act, indicating that the later 6-3 decision in *Nigro* v. *United States*, 276 U. S. 332 (1928), was the result of increased revenue rates added to the Harrison Act after the earlier Supreme Court decisions. He implied that to avoid similar close decisions with the Marihuana Tax Act it would be necessary to provide even more revenue aspects than those contained in the Harrison Act. *Id.* at 8-10, 20. The *Hearings* further indicate that both Congress and the Treasury Department believed that there were laws governing marihuana, of a fairly uniform nature, in every state in the Union. A chart submitted by Mr. Hester showed that all forty-eight States had laws which controlled sale of marihuana. *Id.* at 8-10.

The intended purpose and effect of the Marihuana Tax Act were further expounded in the floor debates which followed submission of the Committee reports.

> The purpose of H. R. 6906 is to develop a plan of taxation that will raise revenue and at the same time render *extremely difficult* the acquisition of marihuana by persons who desire it for illicit uses, and, secondly, the publicizing of dealings in marihuana in order to tax and control the traffic effectively. . . . It is not believed feasible to amend the Harrison Act by inclusion of marihuana, for the reason that its control presents a problem different from that of opium and coca leaves, neither of which are grown in the United States. But marihuana is, and a portion of each plant may be used legitimately. Hence, it seems necessary to pro-

vide a separate bill to cover legitimate dealings in marihuana as well as to control and *prevent, if possible, illicit dealings.*

81 CONG. REC. APP. 1440, 1441 (1937) (Extension of remarks of Rep. Frank H. Buck) (Emphasis added).

In this bill we have presented for the consideration of the Congress a combination of the Harrison Narcotics Act and the National Firearms Act. By it dealers in marihuana must be registered and an occupational tax will be levied on them. Further, a reasonable revenue-producing tax of $1 an ounce is to be placed upon those transfers of marihuana which are legitimate and $100 an ounce placed upon those which are illicit.

81 CONG. REC. 5689 (1937) (Remarks of Rep. Frank H. Buck).

Furthermore, authoritative statements since 1937, including subsequent legislative history, show that §4741(a)(2)'s $100 per ounce tax is indeed required to be paid prior to acquisition of marihuana by an unregistered individual. When the constitutionality of this provision came before the Supreme Court in 1950 in *United States* v. *Sanchez*, 340 U. S. 42, the Government then said, at pages 27-29 of its brief [emphasis added]:

"In the present case, the tax laid by Section 2590 (a)(2) (now 26 U. S. C. §4741(a)(2)) is not conditioned upon commission of a crime. The tax is upon the transfer of marihuana to a person who has not paid the special tax and registered under Section 3230 [4751, 4752] and 3231 [4753]. Such a transfer is not made a crime by the statute, nor is the tax conditioned upon its being shown that the transfer is made crimi-

nal or unlawful by other provisions of law. The only transfers made unlawful by the Act are (1) a transfer not in pursuance of an official order form (Sec. 2591 [4742]): and (2) a transfer *by* a person who has not paid the special tax and registered (Sec. 3234 [4755]). Acquisition of the drug by any person without having paid the transfer tax is also unlawful (Sec. 2593 [4744]). It is thus the failure to pay the tax, either the special or transfer tax, or the acquisition of the drug without a proper order form, which gives rise to criminal liability, and not, as in the *Lipke* and *Constantine* cases, the criminal liability which gives rise to the tax.

It is a constitutional irrelevance, therefore, that the $100 per ounce tax levied by Section 2590(a)(2) [4741 (a)(2)] *may* have a prohibitory effect upon transfers of marihuana to unregistered persons. If Congress can prohibit the transfer of drugs to other than legitimate handlers, as it in effect did under the Anti-Narcotic Act upheld in *Nigro* v. *United States*, 276 U. S. 332, it cannot be an objection to a tax that its effect may be the same as an outright statutory prohibition. If otherwise valid under the Constitution, a tax does not become bad because it is penal in nature. The taxing power clearly permits the imposition of penalties, civil as well as criminal, in aid of collection of revenue. If it had seen fit to do so, *Congress could have imposed an absolute prohibition, enforceable by criminal penalties, upon transfers of marihuana to unregistered persons.* Such a provision would have been clearly constitutional as ancillary to enforcement of the special occupational tax under Section 3230 [4751, 4752] and the $1 per ounce transfer tax under Section 2590 (a)(1) [4741(a)(1)] *That Congress chose instead to im-*

pose a $100 per ounce tax, which would not only accomplish the same result but also provide an additional source of revenue, does not alter the essential validity of its action as an exercise of the taxing power.

Moreover, it should be pointed out in the present case that, like the tax sustained as a civil sanction in the *Mitchell* case, the tax here is collectible by a distinctly civil procedure. The tax is paid by affixing appropriate stamps to the order form (sec. 2590 (c) [4771]); and the Commissioner makes assessments for unpaid taxes (sec. 3311 [6201(a)(2)]), which may be collected by distraint or court proceedings (sec. 3312 (d) [6502(a)]).

The civil character of the tax imposed by subsection (2) of Section 2590(a) [4741(a)] is not defeated by the fact that its amount is very high in relation to that imposed by subsection (1). The cases previously cited (pp. 11-20) make it clear that a tax laid upon a proper subject of taxation is not to be condemned because of its amount. In any event, Congress was fully justified in fixing a higher tax upon transfers of marihuana to persons who had not registered under the law and paid the special occupational tax. It is *obviously unlikely* that such persons will voluntarily report the transfer to the collector and pay the tax due. The higher rate of tax, as in the *Mitchell* case (*supra*, at p. 401), was provided 'primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud. [Footnote: Indeed, a tax which is merely nominal in amount might possibly be more vulnerable. *See Nigro v. United States*, 276 U. S. 332, 346-347, 353.]

The Supreme Court, in upholding the validity of the tax as a revenue measure, said

> It is obvious that §2590 [now §4741], by imposing a *severe burden* on transfers to unregistered persons, implements the congressional purpose of restricting traffic in marihuana to accepted industrial and medicinal channels. Hence the attack here rests on the regulatory character and prohibitive burden of the section as well as the penal nature of the imposition. But despite the regulatory effect and the close resemblance to a penalty, it does not follow that the levy is invalid. . . . .
>
> *First.* It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. *Sonzinsky* v. *United States,* 300 U. S. 506, 513-514 (1937). The principle applies even though the revenue obtained is obviously negligible, . . . or the revenue purpose of the tax may be secondary . . . Nor does a tax statute necessarily fall because it touches on activities which Congress might not otherwise regulate . . . These principles are controlling here. The tax in question is a legitimate exercise of the taxing power despite its collateral regulatory purpose and effect.
>
> *Second.* The tax levied by §2590(a)(2) [now §4741(a)(2)] is not conditioned upon the commission of a crime. The tax is on the transfer of marihuana to a person who has not paid the special tax and registered. *Such a transfer is not made an unlawful act under the statute.* Liability for the payment of the tax rests primarily with the transferee; but if he fails to pay, then

the transferor, as here, becomes liable. It is thus the failure of the transferee to pay the tax that gives rise to the liability of the transferor. Since his tax liability does not in effect rest on criminal conduct, the tax can be properly called a civil rather than a criminal sanction. The fact that Congress provided civil procedure for collection indicates its intention that the tax be treated as such . . . Moreover, the Government is seeking to collect the levy by a judicial proceeding with its attendant safeguards. . . .

Nor is the civil character of the tax imposed by §2590(a)(2) [now §4741(a)(2)] altered by its severity in relation to that assessed by §2590(a)(1) [now §4741 (a)(1)]. The difference has a rational foundation. Unregistered persons are *not likely* to procure the required order form prior to transfer or pay the required tax. Free of sanctions, dealers would be prone to accommodate such persons in their unlawful activity. The imposition of equally severe tax burdens on such transferors is *reasonably adapted to secure payment of the tax by transferees or* stop transfers to unregistered persons, as well as to provide an additional source from which the expense of unearthing clandestine transfers can be recovered. 340 U. S. at 44-46. (Emphasis added.)

In enacting the Guam Organic Act of 1956, Congress itself declared its understanding of the Marihuana Tax Act as follows:

The Marihuana Tax Act, enacted in 1937, imposes an annual tax, in the nature of a registration fee, upon persons dealing in marihuana (such as importers, manufacturers, doctors, and research workers), and it

> also imposes a transfer tax upon the transferee with respect to sales, exchanges, and gifts of marihuana. The statute applies to Guam, as well as to the other territories. When the Marihuana Tax Act was enacted, it was supposed that there were legitimate medical needs for the drug. It has since developed that there are not, and section 14 would therefore make this law inapplicable to Guam. *The law has the effect of legitimizing dealings in marihuana, and if no legitimate need exists, it is considered desirable to make the statute specifically inapplicable.*

S. Rep. No. 2662, 1956 *U. S. Code, Cong. & Ad. News* 4062, 4067. (Emphasis added.)

In 1963, the Final Report of the President's Advisory Commission on Narcotics and Drug Abuse, of which Judge Prettyman was chairman, stated:

> The *rate* [under the Marihuana Tax Act] for transfers to persons who are not registered taxpayers is *prohibitory.*
>
> . . .
>
> The amounts collected under the Harrison Act are relatively minor, and the Marihuana Tax Act yields nothing because *the tax rate is deliberately prohibitive.* Taxation is in fact only a guise for law enforcement and regulation.

Commission Report at 32. (Emphasis added.) The Commission went on to recommend:

> New statutory authority should be substituted for the Marihuana Tax Act. The practical purpose of the Act is to limit the acquisition of marihuana by imposing a prohibitory tax on all transfers of marihuana. Ac-

cording to the Commission on Narcotic Drugs of the United Nations Social and Economic Council, "cannabis (marihuana) appears to have no beneficial effects in modern medicine." Thus there is no need to perpetuate the myth of its availability subject to payment of a transfer tax.

Id. at 36.

Respondent's analogy to the Harrison Narcotics Act is misplaced. Under that Act, there are some 394,193 registrants, as compared with 88 under the Marihuana Tax Act, and vast quantities of narcotics are dispensed lawfully for medicinal purposes, whereas marihuana has no accepted medicinal use. *See* Bureau of Narcotics, *Report on Traffic in Opium and Other Dangerous Drugs* 10, 24 (1966). The revenue raising effect of the Harrison Act is arguably substantial, but the Marihuana Tax Act has been described as producing no revenue. *See* Report of President's Advisory Commission on Narcotic and Drug Abuse, *supra*. What it does raise in gross receipts (apart from perhaps $100 annually from registration fees and any amount raised by the $1.00 per ounce tax on acquisitions by registrants) is solely from nonvoluntary collection after transactions have occurred allegedly in violation of the act, as in the present case, and amounts to $418,000 for the period from 1962 through 1965 as compared with $5,813,000, for the same period, for narcotics. President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Narcotics and Drug Abuse 13 n. 101 (1967).

Since this apparently would not exceed the cost of collection, it was and is doubtful that there is a valid revenue purpose for the Marihuana Tax Act. Thus under the Harrison Act, the taxing power could be used to support the

basic tax on legitimate transactions, and illegitimate transactions might be prohibited as an incident thereto, as held in *United States* v. *Doremus*, 249 U. S. 86 (1919), and *Nigro*, *supra*, according to the Government's Brief in *Sanchez*, *supra*. But since Congress in 1937, while it might not have known that there was *no* medical use for marihuana, knew that there was virtually no use, and since the Harrison Act decisions had been 5–4 and 6–3 with dissenting justices unwilling to sustain even that tax as a revenue measure (*see Hearings*, *supra* at 8-10, 20 for a discussion of congressional concern over the Harrison Act decisions), Congress in the Marihuana Tax Act apparently was unwilling to rely upon a prohibition incident to the basic tax on legitimate transactions, which was too flimsy a revenue base on which to build an "incidental" argument, but rather made maximum use of the taxing power through a $100 prohibitory tax on unregistered, and thus usually illicit, transactions.

Respondent also relies (Respondent's Brief at 18-19, 22) upon its construction of the applicable Treasury regulations. We contend that, properly interpreted, these regulations do not prevent voluntary payment of the tax by one whose acquisition of marihuana would violate state or local law.

Respondent claims that 26 C. F. R. §§152.67 and 152.68 "require the signing of applications for order forms (necessary for payment of the tax) by the same person who signed the registration, with comparison of the two signatures by the district director before the order form may issue." Respondent has omitted the first word of these provisions, *i.e.*, "Generally," which at least creates an ambiguity as to whether there is an absolute signature require-

ment.[2] More important, however, respondent's interpretation of this signature provision as a prohibition against non-registered individuals' obtaining order forms is far-fetched. The provisions are addressed to identifying the applicant, and the district director must be satisfied (generally upon comparison of signatures) "that the application is authentic." Naturally, an applicant for such an order form would "generally" be a §4751 registrant, and thus eligible to pay the $1 per ounce tax under §4741(a)(1). But, in the highly unlikely event that a non-registrable individual[3] were to seek to pay the $100 per ounce tax, if he furnished indisputably satisfactory identification plus his signature, we submit that it is far-fetched to say that the signature regulations mean that he could not pay the tax, merely because the "generally" proper means of identification by comparison with his signature on a registration could not be used. Certainly the regulations should be construed, if possible, to preserve their validity under the statute, and, as previously shown, the statute does not forbid, but rather requires, the payment of tax by such an individual. Finally on this point, it should be noted that these signature regulations have been in existence since 1937 (*see* 26 C. F. R. §§152.47, .48 (1938), whereas the first time *any* "lawfulness" doctrine appeared in the regulations was with the addition in 1949 of then §152.4a (now §152.21) indicating that a *miller* who applied for

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[2] It is arguable by respondent that the use of "generally" only relates to the provision for powers of attorney in the next sentence. Both of these provisions have been in the Regulations since 1937. However, if this were the only intended reference, one would expect the regulation to say "except as provided in this paragraph" rather than "Generally."

[3] *E.g.*, a religious cultist or faddist seeking marihuana for personal use who believed that he could not be indicted for possession under state or federal law or who intended, as a matter of some principle, not to rely on a Fifth Amendment privilege but to expose himself to prosecution.

registration would be investigated as to the lawfulness of his activity under state law. It was not until 1964 that the lawfulness doctrine was extended to cover not only millers, but also all other applicants for registration (§152.22). 29 Fed. Reg. 3758, 3760 (1964). In the general revision of 1964, the transfer tax order form application signature requirements remained unchanged from their 1937 version, but were renumbered as §§152.67 and 152.68. Since the signature requirement for transfer tax antedates by 27 years the adoption of the lawfulness requirement for registration and annual tax, it seems wrong to read the signature requirement as anything but an identification provision.[4]

The regulation, 26 C. F. R. §152.23, which purports to require an application for §4751 registration to show that the proposed operation is lawful in the relevant jurisdiction is irrelevant in the present case and, incidentally, invalid. It is irrelevant because petitioner was charged, in effect, with failure to pay the §4741(a)(2) tax of $100 per ounce applicable to non-registrants, and respondent has not shown that petitioner was a dealer, researcher, or other type of person eligible for §4751 registration regardless of the legality of such activity.[5] As respondent concedes, the Marihuana Tax Act does not contain a provision like 26 U. S. C. §4705(f), which expressly states that order

[4] It is noteworthy that in renumbering the transfer tax signature provisions and adopting the unlawfulness rule for non-miller registrants, the 19[illegible] Treasury Decision was deemed sufficiently non-substantive to warrant adoption without notice of proposed rule-making. *See* 29 Fed. Reg. 8769 (1964).

[5] In fact, respondent apparently states that the registration requirements do not apply to, and expressly forbid, "itinerant" vending or peddling of marihuana. We believe that the occupational tax requirements do not apply to every person who makes a sale of marihuana, much less to every "handler" of marihuana, but only to those whose activities constitute an occupation such as that of a dealer.

forms for narcotics (not marihuana) are properly available to occupational registrants only. It is also invalid, as we read the act, because nothing in the language of the act or its legislative history justifies any such reference to legality. As respondent notes, the Marihuana Tax Act does not contain a provision like that of the Harrison Anti-Narcotic Act of 1914, 26 U. S. C. §4705(g), which makes it unlawful to obtain by means of order forms narcotic drugs (not marihuana) other than in a lawful business or legitimate practice of a profession. *See* quotation from Government's Brief in *Sanchez, supra.* As noted, this Marihuana Tax regulation did not appear until 1964.

Inspection of the legislative history will bear out that no such absolute restriction was intended in the Marihuana Tax Act. Rather, categories which could tend to include all "legitimate" possessors were enumerated in §4751, but it is clear that an illegitimate dealer, though "not likely" to register, could do so. The only statutory provision governing the relationship between registrants and state law has a meaning precisely opposite to 26 C. F. R. §152.23. It is 26 U. S. C. §4906, not cited by respondent (or petitioner), which provides as follows:

> The payment of any special tax imposed by this subtitle for carrying on any trade or business shall not be held to exempt any person from any penalty or punishment provided by the laws of any State for carrying on the same within such State, or in any manner to authorize the commencement or continuance of such trade or business contrary to the laws of such State or in places prohibited by municipal law; nor shall the payment of any such tax be held to prohibit any State from placing a duty or tax on the same trade or business, for State or other purposes.

Even if respondent's unsupported assertion that IRS officials would not have permitted petitioner to pay the tax is correct, it cannot help respondent's argument so long as the statute required petitioner to pay and required the government to accept payment. Moreover, it is interesting to note that respondent at least allows the possibility of an attempt by petitioner or other transferees to pay the tax. Respondent's Brief at 17, 24-25. Respondent's suggestion that such an attempt would not have subjected petitioner to a real threat of prosecution is highly unrealistic. The tax would be tendered to employees of the Internal Revenue Service district director's office in New York or wherever the proposed purchase was to take place. One can readily imagine that an attempt to pay the tax would arouse comment and curiosity among the IRS employees who deal with narcotics taxes. Communication of the relevant information to the United States, *i.e.*, to its agent Internal Revenue employees, would put in respondent's hands the information which might lead to prosecution under federal statutes such as 26 U. S. C. §176(a) and others. This in itself is incriminatory, even if the information is returned. Compare Respondent's Brief at 17, n. 16.

Moreover, there is no showing that petitioner knew of the return practice, if it exists, so that he may assert that he reasonably feared incrimination. Actually, voluntary tender, being so self-incriminatory, is so unlikely that any representation as to what IRS employees would have done when confronted with this novel circumstance is unreliable. Respondent, while suggesting that there is no record of a successful attempt to pay by a non-registrant (Respondent's Brief at 17), also indicates that there is

no record of a case of an *unsuccessful* attempt,[6] so that what the IRS would have done may be essentially a speculative conclusion influenced by the exigencies of litigation, although it may have been a procedure "known" by some.[7]

Furthermore, petitioner might have reasonably feared that information would be passed within the United States Government, including to the United States Attorney in New York and others who could have prosecuted under federal law, and to police in New York or other states where he lived or was thought to have possessed marihuana,

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[6] *Compare* Record, Testimony of Donald E. Miller, Chief Counsel United States Bureau of Narcotics, Feb. 6, 1968, in *United States* v. *Alston*, Crim. No. 991-66 (D. D. C. 1968), before Judge Oliver Gasch, at 11: "To my knowledge I don't recall anyone ever applying for this order form." *See* also Memorandum dated Feb. 7, 1968 from Mr. Miller to the Ass't United States Attorney, submitted in *United States* v. *Alston* pursuant to the request of Judge Gasch, at 1-2: "None of the persons I spoke with (including the chief of the collection division and the two persons under his supervision charged with the operation of processing order forms in the IRS Baltimore District Director's office) had ever heard of such an application being submitted."

[7] Mr. Miller also testified: "I would say that it (information obtained from applications) is not privileged." *Alston* Record at 18.

As to disposition of an unsuccessful application, Mr. Miller testified: "I can't answer you specifically whether it is given back to the applicant marked disapproved or whether it is retained on file." *Alston* Record 12. Upon further inquiry by the Court as to whether disapproved applications are returned or filed, Mr. Miller stated: "That I can't answer, sir. I think I ventured a guess when I said they would probably give it back . . . I would have to check I think with every District Director of Internal Revenue in the United States." *Alston* Record 16-17. The Court's request for information as to "only this jurisdiction" resulted in the cited Memorandum, in which the Baltimore official in charge stated "somewhat as follows": that the application would have been returned and that "he could perceive of no reason why the application form would have been retained in the files of the Internal Revenue Service." If this point is reached, petitioner should not be held to a higher standard of actual or constructive notice of the supposed "return" procedure than that of the Chief Counsel of the Bureau of Narcotics.

because of the statutorily required close cooperation of federal, district and state marihuana authorities. *See, e.g.*, 26 U. S. C. §4773. He certainly could not constitutionally be compelled to rely upon the occurrence of an internal failure of communication.

II.

As construed by respondent, the Marihuana Tax Act would violate various constitutional and statutory provisions.

1. We reject respondent's analogy to drivers' licenses. What is offensive to substantive due process, we contend, is a statute which imposes on petitioner an affirmative obligation restricting his liberty of conduct (to pay tax when acquiring marihuana and to transfer only in pursuance of an order form) and at the same time imposes upon law enforcement officials the duty (respondent alleges) to prevent petitioner from fulfilling his obligation, and then deprives petitioner of his liberty by imprisonment when the law enforcement officials prevent him from complying. This is not the same as forbidding him from acquiring, and punishing him when he does the forbidden act. The act of acquiring pursuant to official tax-paid order form has not been forbidden; it has been required but prevented. The concept of law enforcement officials being compelled to prevent citizens from complying with mandatory requirements of law is so repugnant that it should not be read into the statute. Where the requirements enjoined upon petitioner are expressed in the law, and the claimed requirements upon the law enforcement officials are derived only in respondent's brief, the conflict is easily

avoided by a proper interpretation of the statute, which may save the statute but which prevents prosecution of one asserting his self-incrimination privilege.

This argument is closely related to the void for vagueness and lack of notice argument. *Cf. United States* v. *Cardiff*, 344 U. S. 174 (1952). Where the statute does not make clear the elements of an offense, this defect is not cured by showing that petitioner committed an act which would violate both the unstated meaning and the stated but unintended meaning. Nor is it relevant whether petitioner actually considered the meaning of the statute or its relationship to the privilege against self-incrimination or anything else before he acted.[a]

The Administrative Procedure Act is relevant because if respondent's construction of the statute were permissible but not adequately spelled out in the statute itself, the spelling-out could be accomplished by a properly adopted administrative regulation published in the *Federal Register*. Since no such regulation had been promulgated, the Administrative Procedure Act, as in effect in 1965 at the time of the transfers to petitioner, provided that no person could "in any manner be required to resort to . . . procedure" not so published. Administrative Procedure Act,

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[a] In *Browning* v. *United States*, cited in respondent's brief at 27, the Ninth Circuit brushed aside a number of contentions raised in a 213 page brief which did not conform to the court rules. The passage respondent apparently relies upon merely says:

> Appellant next contends that it is impossible to pay the tax on marihuana which is referred to in 26 U. S. C. §4741. A short answer to this is that he was not charged with conspiring to fail to pay the tax, but was charged with conspiring to transfer marihuana not pursuant to a written order.

366 F. 2d 420, 422 (9th Cir. 1966).

§3(a), 5 U. S. C. §1002(a) (1964 ed.). Moreover, under the provisions added in 1966 by the Freedom of Information Act, no person shall in any manner be required to resort to "or be adversely affected by any matter required to be published in the Federal Register and not so published . . . except to the extent that . . . [he] has actual and timely notice of the terms thereof." 5 U. S. C. §552 (a)(1) (Supp. 1968). Under the amended provisions, it appears that petitioner cannot now be adversely affected by any matter which should have been published in the *Federal Register* and has not yet been so published. *See* Sobeloff, *The New Freedom of Information Act: What it Means to Tax Practitioners*, 27 J. TAXATION 130, 130-31, 134 (1967). It is apparent that if the validity of petitioner's conviction, in the light of *Grosso*, *Haynes* and *Marchetti*, rests upon respondent's unpublished construction of the Marihuana Tax Act, affirmance of the conviction would affect petitioner adversely and reversal is thus proper.

2. As interpreted by respondent, the Act would exceed the taxing power of Congress. On this interpretation, the constitutional doubts which, it is argued above, impelled Congress to require payment of the $100 tax were well founded.

In particular, respondent's interpretation would make the Act violate the requirement of Article I, Section 8, clause 1 of the Constitution that "all . . . Excises shall be uniform throughout the United States." The applicability of the tax cannot thus be made to depend upon legality under state law, which may vary both from state to state, and from time to time within a state. *Compare United States* v. *Constantine*, 296 U. S. 287 (1935); *Knowlton* v. *Moore*, 178 U. S. 41 (1900).

As discussed above, the revenue raising aspects of the Marihuana Tax Act and of the federal narcotics tax provisions have significant differences. On respondent's interpretation, if *Sanchez* were reconsidered today, we suggest that the prohibitory provisions would not stand. The $100 tax which cannot be voluntarily paid would be held to be a sham use of the taxing power. The same might well be true of the firearms and narcotics taxes upon a searching challenge today. *Compare* T. POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 86-87 (1956):

> Supposedly . . . [the taxing power] may not be used to suppress an enterprise if the Supreme Court can catch on to what it is up to . . . Hardly candid have been the opinions sanctioning excises on dispensing drugs, on sawed-off shotguns, on engaging in bookmaking (not publishing), and perhaps on some other enterprises that Congress thought needed watching.

It is clear from the legislative history and the provisions themselves that the sections of the law at issue were not premised upon the commerce power and cannot be sustained on that basis. Of course, with the broadening of the commerce power, it may well be that valid regulatory provisions can be framed, but that will require consideration by Congress of a new statute.

3. If the statute is really a licensing provision as to the transfer tax, it would also violate due process and the Administrative Procedure Act, *see* 5 U. S. C. §§551(9), (12), (13), 558(c), by failing to provide procedures for determining denial of an application to pay the tax, including provisions for hearing and review. Without such a determination, at least the respondent cannot use against

petitioner the conclusion that petitioner was not entitled to pay.

4. It is further submitted that if the prohibition turns upon state law, the statute constitutes an unconstitutional delegation of power to the states. If the statute somehow authorizes the making of regulations and administrative interpretations neither specifically authorized pursuant to a defined standard nor validly interpreting the statute, it constitutes an unconstitutional delegation of power to the administering agencies to determine the elements of a crime.

5. If the essence of the prohibited conduct is that it violates state law, the statute would raise a serious question as to whether it preempts District of Columbia or state law. *Compare Commonwealth* v. *Nelson,* 350 U. S. 497, 510 (1956). Moreover, there would be a serious question as to double jeopardy, in the absence of preemption.

6. In addition, we raise the argument that *Griswold* v. *Connecticut,* 381 U. S. 479 (1965), applies, as do arguments advanced in *Scott* v. *United States,* Crim. App. No. 21,016 (D. C. Cir. April 29, 1968).

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

JONATHAN SOBELOFF
506 E Street, N. W.
Washington, D. C. 20001
Attorney for American Civil Liberties Union, Amicus Curiae

MELVIN L. WULF
of Counsel

October 1968

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IN THE

Supreme Court of the United States

October Term 1968

No. 65

TIMOTHY F. LEARY,
Petitioner,

against

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

ROBERT J. HAFT,
Counsel for Petitioner,
140 East 80th St.,
New York, N. Y. 10021.

Of Counsel:
JEROME SIEGMAN.

TABLE OF CONTENTS

PAGE

The Government's construction of the Marihuana Tax Act is erroneous. The Act requires all proposed marihuana transferees, including persons whose proposed possession is likely to be unlawful to obtain an order form and pay the transfer tax. 1

The 21. U.S.C. § 176a Presumption Is Arbitrary and Unreasonable 7

The Government's contention that the statutory presumption was merely an alternative theory submitted to the jury does not prevent reversal of the conviction. 13

CONCLUSION 14

TABLE OF CITATIONS

Cases

U. S. v. Adams,—F. Supp.—Frankel, *D.J.* 8

United States v. Romano, 382 U.S. 136 (1965)..... 14

United States v. Sanchez, 340 U.S. 42 (1950)..... 5

Statutes and Regulations

	PAGE
21 U.S.C. § 176a	7, 13
26 U.S.C. § 4705	2
26 U.S.C. § 4742(a)	2
26 C.F.R. 152.61	6
26 C.F.R. 152.62	6
26 C.F.R. 152.66	6
26 C.F.R. § 152.67	6
26 C.F.R. § 152.68	6

Miscellaneous

Brief for the United States in United States v. Sanchez, 340 U.S. 42 (1950)	5
Hearings on H.R. 6385 before the Committee on Ways and Means; 75th Cong., 1st Sess. (1937)	4
1956 U. S. Code Cong. & Ad News	7
S. Rep. No. 1997, 84th Cong., 2d Sess. (1956)	13

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REPLY BRIEF FOR PETITIONER

The Government's construction of the Marihuana Tax Act is erroneous. The Act requires all proposed marihuana transferees, including persons whose proposed possession is likely to be unlawful to obtain an order form and pay the transfer tax.

The Government has unequivocally taken the position that the Marihuana Tax Act constitutes a *complete prohibition* upon the acquisition of marihuana by unregistered persons — those whose proposed possession is likely to be illegal. According to the Government, such persons cannot obtain an order form, cannot prepay the tax and cannot in any manner legitimize their acquisition of marihuana. This position is contrary to the express language and legislative history of the Marihuana Tax Act.

The Government asserts that, by construing the Marihuana Tax Act "*in pari materia*" with the Harrison Anti-Narcotics Act of 1914, it has "developed a policy" of refusing to issue order forms to, and accepting payment of the transfer tax from, persons whose intended activities would be illegal (pp. 16, 17).

A comparison of the Marihuana Tax Act with the earlier Harrison Act clearly proves that proposed illegal possessors of marihuana *must* obtain an order form and prepay the tax and proposed illegal possessors of the Harrison Act narcotics are expressly *prohibited* from obtaining an order form or paying the tax. Subdivision (f) of the Harrison Act (26 U.S.C. § 4705) provides that the Secretary of the Treasury "shall require that [written order forms] be sold only to persons who have registered and paid the special tax. . . ." The Marihuana Tax Act requires that every person "whether or not required to pay a special tax and register" obtain a written order form (§ 4742(a)).

The legislative history of the Marihuana Tax Act makes it clear beyond question that Congress intended to reach these totally opposite results. The Treasury Department, as sponsor of the act, through Clinton M. Hester, stated to the House Committee considering the bill:

> We have departed from the Harrison Narcotic Act in one major respect, and we have done that because the Ways and Means Committee departed from the plan of the Harrison Act in preparing the National Firearms Act.
>
> Under the Harrison Narcotic Act no one can buy narcotics unless he has registered and paid the occupational tax. In the National Firearms Act the committee did not follow that plan. Anyone is permitted to buy a machine gun or a submachine gun, but he must pay a $200 transfer tax, and carry out the purchase on an official order form.

The focal point of attack on the Harrison Narcotic Act by the judges who dissented in the *Doremus case* and the *Nigro case,* was that the provision of the act which limited the persons to whom narcotics could be sold clearly indicated that the primary purpose of the act was not to raise revenue but to regulate matters which were reserved to the States under tenth amendment.

Mr. Vinson: How did the Court stand in those cases?

Mr. Hester: In the first case the Court stood 5 to 4, and in the second case the Court stood 6 to 3.

Mr. McCormack: What was the firearms case?

Mr. Hester: The firearms case involved only the occupational tax under the Firearms Act.

Mr. McCormack: Was that decision unanimous?

Mr. Hester: Yes; that was a uninamous decision. That is the decision of March 29. In the Firearms Act you arranged it so that anybody can buy a machine gun but he must pay a transfer tax of $200 and would have to use an order form.

We have looked into the records in connection with the transfer tax in the Firearms Act, and we found that only one machine gun was purchased at $200 last year.

Mr. Dingell: Legitimately?

Mr. Hester: Yes. This bill would permit anyone to purchase marihuana, as was done in the National Firearms Act in permitting anyone to buy a machine gun, but he would have to pay a tax of $100 per ounce of marihuana and make his purchase on an official order form. A person who wants to buy marihuana would have to go to the collector and get an order form in duplicate, and buy the $100 tax stamp and put it on the original order form there. He would take the original to the vendor, and keep the duplicate. If the purchaser wants to transfer it, the person who purchases the marihuana

> from him has to do the same thing and pay the $100 tax. That is the scheme that has been adopted to stop high-school children from getting marihuana. . . .
>
> [T]his bill, like the National Firearms Act, departs from the plan of the Harrison Narcotic Act which limits the right to purchase narcotic drugs to those persons who are permitted to register under that act. This limitation was the focal point of attack against the constitutionality of the Harrison Narcotic Act in the case of *Doremus* v. *United States, supra*, and *Nigro* v. *United States* (1927) (276 U.S. 332). In the latter case, the minority of the court expressed the view that this provision in the Harrison Narcotic Act, which limited the persons entitled to purchase narcotic drugs, was unconstitutional on the ground that it manifested an intention on the part of the Congress to regulate a subject matter reserved to the States under the tenth amendment.
>
> Thus, in order to obviate the possibility of a similar attack upon the constitutionality of this bill, it, like the National Firearms Act, permits the transfer of marihuana to nonregistered persons upon the payment of a heavy transfer tax. The bill would permit the transfer of marihuana to anyone, but would impose a $100 per ounce tax upon a transfer to a person who might use it for purposes which are dangerous and harmful to the public, just as the National Firearms Act permits a transfer of a machine gun to anyone but imposes a $200 tax upon a transfer to a person who would be likely to put it to an illegal use.
>
> Although the $100 transfer tax in this bill is intended to be prohibitive, as is the $200 transfer tax in the National Firearms Act, it is submitted that it is constitutional as a revenue measure." (Hearings on H.R. 6385 before the Committee on Ways and Means; 75th Cong., 1st Sess. at 9, 14 (1937))

In light of the express statutory language of the Marihuana Tax Act requiring written order forms for all transfers and the legislative history clearly mandating that interpretation, it is submitted that no "policy" of the Gov-

ernment nor regulations, can overcome the clear Congressional command.

In any event, the proposition that since 1937 the Government has had a "policy" of prohibiting acquisition of marihuana by proposed illegal possessors is seriously open to question. The Government has never published this policy in any form, and, according to the Government it has never had occasion to effectuate this policy. The Government states: "The Internal Revenue Service has advised us, since it has no record that there has *ever* been such an application by a non-registrant, the Service has never formulated a policy in the form of a regulation or operating procedure for processing such application." (Government Brief, p. 16, Note 16.) Thus the "policy" is apparently a contingent, abstract and unenunciated one. The Government had an opportunity to enunciate this policy in the Court of Appeals in this matter (and presumably in other matters) and never did so. Indeed, as pointed out in the *Amicus Curiae* Brief of the American Civil Liberties Union (pp. 11-13), in 1950 the Government took a position before this Court directly contrary to their instant "construction" of the Marihuana Tax Act. In its brief in *United States* v. *Sanchez,* 340 US 42 (1950) the Government stated:

> If it had seen fit to do so, Congress could have imposed an absolute prohibition, enforceable by criminal penalties, upon transfer of marihuana to unregistered persons. . . . That Congress chose instead to impose a $100 tax, which would not only accomplish the same result but also provide an additional source of revenue, does not alter the essential validity of its action as an exercise of the taxing power." (pp. 27-29).

The Marihuana tax regulations in no way alter the result. The regulations do not expressly or impliedly prohibit the issuance of order forms to unregistered persons.

In fact, the regulations are clearly consistent with the statutory requirement that unregistered persons must obtain an order form and pay the tax. The regulations provide that "the tax applies to every transfer . . ." (26 C.F.R. 152.61); that the tax is $1.00 for registrants and $100.00 for non-registrants (26 C.F.R. 152.62); and, most importantly, that the order form must show "the transferee's name, address, and *if registered* the registration number . . ." (26 C.F.R. 152.66) (italics supplied). The Government's entire argument as to consistent "administrative construction" is based solely upon the requirements for signing the application for an order form and comparing signatures—a mechanical matter. 26 C.F.R. § 152.67-152.68. It is submitted that the signing and comparison requirements were put into the regulations so that only a registrant could avail himself of the markedly lower $1.00 per ounce tax, and that absent proof of registration by signature comparison, the applicant for the order form is required to pay the $100.00 per ounce tax. Certainly the signature and comparison regulations cannot overturn the express statutory language, legislative history and other regulations, all of which clearly negate a complete prohibition on acquisition of marihuana by unregistered persons.

In 1956 the Treasury Department submitted a memorandum to Congress over the signature of W. Randolph Burgess, then Acting Secretary of the Treasury, stating that the Marihuana Tax Act was not a prohibitory statute. The memorandum was submitted in support of the Guam Organic Act of 1956, under which the Harrison Anti-Narcotic Act was made applicable to Guam and the Marihuana Tax Act was specifically made inapplicable to Guam. (See *Amicus Curiae Brief*, A.C.L.U., pp. 14-15). The memorandum stated, *inter alia*:

> It is evidently the intention to make applicable to Guam, all of the internal revenue *narcotic* laws and to give the administrative and enforcement authority under those laws in the island to appro-

> priate officers of the Guam Government, in line with the present plan of enforcement in Puerto Rico. The internal revenue *marihuana* laws, however, are not to be extended to Guam but control of marihuana in the island is to be accomplished by *prohibitory* measure set forth in section 23. This department approves this plan because there is now practically no medical need for marihuana and controlled legislation of the type set forth in section 24 *is much more desirable than legislation of the type of the Marihuana Tax Act.* [Italics supplied]. 1956 U. S. Code Cong. & Ad. News 4062, 4079.

The Government thus had two opportunities to enunciate its "policy"—in the *Sanchez* brief and in the Treasury memorandum—and in both the Government supported Petitioner's construction and negated its present position.

In summary, it is submitted that the Marihuana Tax Act does not prohibit the acquisition of marihuana by proposed illegal possessors, but, on the contrary, expressly and intentionally permits the transfer of marihuana to all persons—provided they obtain a written order form and pay the applicable transfer tax. The Government's strained statutory construction can only be interpreted as an admission by it that the requirement of an order form for proposed illegal possessors and their payment of the $100.00 per ounce tax is blatantly self-incriminatory.

The 21 U.S.C. § 176a Presumption Is Arbitrary and Unreasonable

The Government's Brief reviews the rather meager evidence presented to Congress prior to the passage in 1956 of the statutory presumption in 21 U.S.C. § 176a (pp. 36-37). The Government then states: "We are aware of no new evidence which would detract from the authoritative findings of Congress" (p. 38). Subsequent to the submission of the Government's brief, the United States District Court for the Southern District of New York, held that the statutory presumption contained in § 176a was partially

invalid and that the Government must prove—by evidence independent of the statutory presumption—that a defendant found in possession of marihuana had knowledge of its illegal importation. *U. S.* v. *Adams,* Frankel, *D.J.,* not yet officially reported, 67 CR 414. Upon the basis of evidence submitted by the Government and the defendants at an evidentiary hearing, the *Adams* Court made various findings which are of particular significance to the issuance before this Court. Its findings were as follows:

> Whatever its actual or possible uses, there is botanically but a single species of the plant. Despite the practically total end of licit cultivation, it continues to grow spontaneously or adventitiously in a substantial area of the world and, most interestingly for us, can grow in every State of the United States as well as Puerto Rico, Panama, and the Canal Zone. It spreads, grows, and reproduces itself without human attention . . . It is difficult or impossible for all but the most expert analysts using sophisticated techniques to determine whether any given sample of marihuana comes from this or some foreign country (pp. 6-7).
>
> Year after year the Bureau of Narcotics reports acreages of growth destroyed. The reports reflect that narcotics control must focus upon domestically grown marihuana as well as that smuggled in from abroad. In any single year, the amount of domestic growth thus destroyed could yield more marihuana than all that seized and destroyed by the Bureau and other enforcement agencies. And, of course, there are no figures for domestic growth which is not discovered and not destroyed except as this facet of the matter may be illuminated by the fact that the work continues annually with no apparent diminution over time.
>
> Both 'experts' of one kind or another and laymen are made conscious of the intensive concern of police officials over domestically grown marihuana as the 'raw material' for domestic use of this narcotic. In this and other ways there arises a widespread belief that the widely prevalent use of marihuana is sup-

plied in substantial measure by domestic growth. Professor Schultes reported truthfully his judgment (whether correct or not, it is scarcely possible to know) that the marihuana so widely grown everywhere in the United States is the source of that smoked by most users in this country (pp. 7-8)."

To summarize the general import for our purposes of the formal and informal record, we find:

(1) There is a respectable body of expert authority for the view that most marihuana found in this country has been smuggled in from a foreign country. There are respectable views to the contrary. Congress could reasonably have accepted the former view. But nobody can say with confidence how closely it accords with the facts.

(2) There is no reliable evidence showing the extent to which people 'know' or believe that most illicit marihuana is imported. Even police officers and other interested government agents are by no means necessarily possessed of knowledge or a belief like the one declared to be inferable from possession under §176a. See *Costello* v. *United States*, 324 F.2d 260, 263 (9th Cir. 1963), cert. denied, 376 U.S. 930 (1964); *United States* v. *Kapsalis*, 313 F.2d 875, 876 (7th Cir.), cert. denied, 374 U.S. 856 (1963). Insofar as 'common experience' may suggest an answer, it is that many people, perhaps a majority, users and non-users alike, believe that 'pot' 'is cultivated in vacant lots and other places' (Gonzales *et al., op. cit. supra*), which would account for its widespread use, regular and occasional, from the campus to the ghetto to the country club (pp. 9-11).

It is of interest, then, though by no means crucial, that the legislative history of the statutory inferences in § 176a, as described in a Government Memorandum of Law, 'is indeed meager.' There is no explanation or support of any kind in committee reports. During Senate hearings preceding the enactment, however, Harry J. Anslinger, the Commissioner of Narcotics, reported that 'most of the marihuana traffic in this country is fed from

Mexico. * * * I would say,' he continued, 'that over 90 percent of the cannabis that we have seized has been smuggled from Mexico where they have a very considerable problem themselves and have done a lot in the destruction of clandestine fields.' A Texas official estimated that two percent of the marihuana in his State was 'homegrown' while the rest came from Mexico. Other witnesses gave similar estimates relating to Texas, which is, as the Government implicitly acknowledges, not necessarily representative of the entire country with respect to the problem of smuggling across the Mexican border.

Beyond these 'meager' expressions there is nothing. Nobody appears to have paid the slightest attention to the separate element and additional inference respecting knowledge of importation. It was known then, as it is now, see, e.g., *Butler* v. *United States*, 273 F.2d 436, 438 (9th Cir. 1959), that marihuana, whatever its source, is liable to pass through many hands from grower to smoker. It could readily have been seen that beyond the smuggler and perhaps an early middleman, those found in 'possession' of marihuana were likely to be at a far remove from, and without knowledge of, the source. Yet it was and is possession alone which allows the whole gamut of statutory inferences, including the inference that the possessor knew of the illegal importation. And, of course, 'the jury must be satisfied, on knowledge as on all other elements, beyond a reasonable doubt.' *United States* v. *Llanes*, 374 F.2d 712, 716 n. 4 (2d Cir.), cert. denied, 388 U.S. 917 (1967). It is here, in this court's view, that the statutory inferences become 'strained' and 'arbitrary,' and thus invalid under the Due Process Clause. *Tot* v. *United States*, 319 U.S. 463, 467-68 (1943) (pp. 11-13).

After making the foregoing findings, the District Court held:

While it has not commonly been featured in the standard formulations (but see Mr. Justice Black, dissenting in *United States* v. *Gainey, supra* at 82, 83, 85-86), it is fitting to stress that our problem is

in the setting of a criminal prosecution. No authority in any relevant context has ever suggested that the statutory inference was intended, or may properly serve, to lighten the prosecution's burden of proof beyond a reasonable doubt. On the contrary, it is routine and standard practice under 21 U.S.C. §176a, as under §174, to instruct the jury (or to hold in a bench trial) that no conviction may be had unless the prosecution has proved *each element of the offense*—including importation *and* knowledge thereof—beyond a reasonable doubt. See, e.g., *United States* v. *Gibson*, 310 F.2d 79, 81 (2d Cir. 1962); *United States* v. *Peeples*, 377 F.2d 205, 211 (2d Cir. 1967); *United States v. Llanes*, 374 F.2d 712, 714, 716 (2d Cir. 1967). And so when we *allow* the drawing of an inference like the type here in issue, we must be telling juries (or ourselves as triers of fact) that the inference is one sustained by substantially more than a preponderance of the evidence, that the probability is far in excess of 50-50, that it is sufficient to warrant a reasonable man's being convinced "to a moral certainty" of the correctness of the inference. See, e.g., *United States* v. *Bilotti*, 380 F.2d 649, 654 (2d Cir.), *cert. denied*, 389 U.S. 944 (1967). (pp. 16-17).

There was no basis in 1956, and there is none today, for thinking it 'very likely' that people found in possession of marihuana 'know' it to have been imported. Whether or not most marihuana is imported, there is powerful evidence that enormous numbers of people, experts as well as laymen, 'know' a good deal (or even most) marihuana found in the United States is grown and harvested here. The statutory inference is written to embrace possession and possessors generally. It is not confined in place—e.g., to Texas or other border States. It is not limited as to prospective defendants—to users, or wholesalers, or even retailers. It reaches students, housewives, slum-dwellers, the schooled and unschooled, the naive and the sophisticated, everywhere and all alike. There is no need—and no solid basis—to suggest that a more confined version would be more nearly sustainable. It is enough that Con-

> gress has crossed a forbidden line by inadvertently announcing an 'arbitrary' and 'strained' and highly unlikely proposition about a supposedly general matter of fact.
>
> Insofar as §176a proclaims a statutory inference that one found in possession of marihuana knows it to have been illegally imported, the statute is unconstitutional because it denies due process. (pp. 19-20)

The District Court also specifically rejected the contention that it was more difficult for the Government to prove the origin of marihuana than for the defendant to prove this fact:

> Congress had (at least so far as it disclosed) no pragmatic basis whatsoever for supposing that a possessor of marihuana is any better equipped, or even as well equipped, as the government 'to trace back through one or a dozen hands to the person who originally grew the weed.' This court—which may perhaps be said to deal more intimately, week in and week out, with narcotics problems than most members of the Congress—cannot pretend not to know, judicially or otherwise, what it knows of 'connections' and 'pushers' and the other miscellaneous figures in the trade. There is powerful reason to *disbelieve,* rather than to believe, that random people found with marihuana could know (or, a fortiori, could prove) its ultimate source. . . . Suitable cases for 'presumptions' are those where the truth of the fact in question and the existence of evidence about it, is almost certain to be within the defendant's ken—as, for example, what he himself was doing near a still, *United States* v. *Gainey, supra,* how he himself came to be in possession of something, *Morrison* v. *California,* 291 U.S. 82, 91 n. 4 (1934), or whether he himself had a license or permit of a specified kind, *ibid.* Such instances are utterly unlike a requirement of 'going forward' concerning a chain of transfers linking unknown people at distant removes in a world of stealth and shadows. And it bears reemphasis that even relative ease of proof

(the 'corollary')—as, what the defendant was doing near a still—is not even reached where the controlling test of high probability (rationality) is unsatisfied. *United States* v. *Romano, supra.* (pp. 22-23)

In partially invalidating the § 176a presumption, *Adams* relied principally upon the subjective element of knowledge and apparently did not feel it necessary to treat the second subjective element of the crime: the "specific intent to defraud the United States". An examination of the legislative history of the statute indicates that Congress intended that this additional subjective element be significant. The Treasury Department commenting on the then proposed bill urged that the element be deleted. It stated: "It is suggested that the pharse 'with intent to defraud the United States' in the proposed section 1404 adds an unnecessary element to the crime without serving any other useful purpose, and it might therefore be deleted." S. Rep. No. 1997, 84th Cong., 2d Sess. p. 23 (1956). The "intent to defraud" element was not deleted, and consequently, it is inferable that Congress intended this element of the crime to be one which should not be inferred merely from the objective acts of a defendant, but rather one which would have to be specifically found by a jury. The statutory presumption in § 176a emasculates this separate element of the crime as much as it emasculates the element of knowledge of illegal importation.

The Government's contention that the statutory presumption was merely an alternative theory submitted to the jury does not prevent reversal of the conviction

The Government argues that whether or not the presumption is sustained by this Court, the conviction must be affirmed because there was other adequate evidence of guilt on the importation count. The Government refers to this other evidence as the "alternative theory" of guilt (pp. 31-35). The Government argues that because the

other evidence of guilt was so clear and compelling the trial court's charge to the jury with respect to the § 176a presumption may not have substantially affected the result and, hence, even if the Court invalidates the presumption, the Court should affirm the conviction.

This Court has recently rejected this contention. *United States* v. *Romano*, 382 U.S. 136, 138 (1965). In *Romano*, the Court held the statutory presumption of guilt of the crime of possession, custody and control of an illegal still arising from mere presence at an illegal still site to be unconstitutional. Before reaching the substantive issue the Court held:

> If we were reviewing only the sufficiency of the evidence to support the verdict on Count 1, that conviction would be sustained. There was, as the Court of Appeals recognized, ample evidence in addition to presence at the still to support the charge of possession of an illegal still. But here, in addition to a standard instruction on reasonable doubt, the jury was told that the defendants' presence at the still 'shall be deemed sufficient evidence to authorize conviction.' This latter instruction may have been given considerable weight by the jury; the jury may have disbelieved or disregarded the other 'evidence of possession and convicted these defendants on the evidence of presence alone. We thus agree with the Court of Appeals that the validity of the statutory inference in the disputed instruction must be faced and decided.

CONCLUSION

The judgment below should be reversed in all respects.

Respectfully submitted,

ROBERT J. HAFT,
Counsel for Petitioner.

Of Counsel:
JEROME SIEGMAN.

Supreme Court of the United States.

October Term, 1968.

No. 65.

TIMOTHY F. LEARY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION OF NATIONAL STUDENT ASSOCIATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE.

Jonathan B. Orent,
41 Tremont Street,
Boston, Mass. 02108,
Attorney for National Student Association as Amicus Curiae.

Table of Contents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE 1

BRIEF OF AMICUS CURIAE 5

Interest of amicus 5

Summary of argument 7

Argument 10

I. Preliminary analyses necessary to a full discussion of the case at bar 10

A. The relevant cases 10

B. The relevant statutes 20

B1. Incorporation of the basis of illegality from other statutes 21

B2. Constitutionality of incorporated Marihuana Tax-Act requirements 23

B3. The unconstitutional use of customs requirements under 21 U.S.C. § 176a 24

B4. Classes of violators under § 176a 25

B5. Summary 26

C. Legislative history and operation of state and federal marihuana laws 27

II. Conviction of violators of the Marihuana Tax Act, and therefore convictions of tax violators under § 176a, cannot be constitutionally upheld consistently with the principles of Marchetti 35

III. Notwithstanding the validity of any parts of Title 19 of the U.S. Code, customs violators may not be convicted under 21 U.S.C. § 176a, for failure to disclose their possession or importation of marihuana consistently with the principles of Marchetti and Grosso. 38

IV. Under the rule in Haynes, taken alone, importers charged under § 176a[3] should be afforded the Fifth Amendment privilege as a complete defense; but because an attempt to assert the Haynes defense would itself necessitate self-incrimination under state law, the whole of § 176a[3] should be held unconstitutional 50

V. The use of forced disclosure provisions in the present statutes cannot be justified by the Government's greater interest and power in the area of border control, because the Government can adequately effectuate its interests by prohibiting the importation of marihuana entirely 59

VI. The presumption in 21 U.S.C. § 176a, is void because the standard of "rational connection" between the fact proved and the fact presumed is inappropriate to it, inasmuch as most innocent defendants cannot reasonably be expected to rebut the presumption, and no evidence exists which would sustain the presumption under any more stringent standard of constitutional scrutiny 62

Conclusion 74

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Gompers v. United States, 233 U.S. 604 46

Grosso v. United States, 390 U.S. 62, 88 S. Ct. 709 1 et seq.

Hawes v. Georgia, 258 U.S. 1, 42 S. Ct. 204 67n.
Haynes v. United States, 390 U.S. 85, 88 S. Ct. 722 1 et seq.
Jones v. United States, 362 U.S. 257 27, 57
Lewis v. United States, 348 U.S. 419 12
Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S. Ct. 337 68n.
Luria v. United States, 231 U.S. 9, 34 S. Ct. 10 67n.
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Shapiro v. United States, 335 U.S. 1 2; 13, 42, 45
Thomas v. United States, 314 F. 2d 936 21
Tot v. United States, 319 U.S. 463, 63 S. Ct. 1241 62, 66
United States v. Kahringer, 345 U.S. 22 12
United States v. Romano, 382 U.S. 136, 86 S. Ct. 279 72, 73
Yee Hem v. United States, 268 U.S. 178, 45 S. Ct. 470 67, 68, 69, 70

STATUTES, ETC.

U.S. Constitution, Fifth Amendment 1 et seq.
18 U.S.C. § 371 15, 28
18 U.S.C. § 545 47
18 U.S.C. § 1407 28
19 U.S.C. §§ 1304, 1484 and 1552 38
19 U.S.C. §§ 1496 and 1497 21
21 U.S.C. § 176a 1 et seq.
21 U.S.C. § 182 28
26 U.S.C.
§ 4401 15
§§ 4403 and 4423 11

§ 4411	11, 15
§ 4412	11, 27
§ 4751	27, 35, 36
§ 4753	35
§ 4754	36
§ 4755	22, 23, 27, 35
§ 4773	36, 49
§ 4775	36, 49
§ 5755	37
§ 5841	16, 17, 18
§ 5848	16
§ 5851	16, 17, 18, 19

MISCELLANEOUS.

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Supreme Court of the United States.

OCTOBER TERM, 1968.

No. 65.

TIMOTHY F. LEARY,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

MOTION OF NATIONAL STUDENT ASSOCIATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE.

The National Student Association files this brief in the belief that punishment of petitioner under either the Marihuana Tax Act or *21 U.S.C. § 176a,* would violate petitioner's Fifth Amendment privilege against self-incrimination.

Petitioner has by his attorney granted his permission for the filing of this brief, but the permission of the United States was denied by the Solicitor General.

We believe that, while petitioner and the American Civil Liberties Union as Amicus Curiae have made adequate examinations of the effect of the Fifth Amendment privilege on the Marihuana Tax Act, an exceptionally important line of argument has not been satisfactorily put forth concerning the effect of the Fifth Amendment privilege on 21 U.S.C. § 176a, under which petitioner is also charged! It is our opinion that the standards defined in the cases of *Marchetti* v. *United States,* 390 U.S. 39 (1968); *Grosso* v.

United States, 390 U.S. 62 (1968); and *Haynes* v. *United States,* 390 U.S. 85 (1968), apply to 21 U.S.C. § 176a, but in a radically different way than they apply to the Marihuana Tax Act. The Tax Act is the easier statute to attack, because it was modelled upon the National Firearms Act and the Gambling Tax Act, and presents problems closely analogous to those two acts. 21 U.S.C. § 176a, however, does not in itself create a crime, as does the Marihuana Tax Act, but, through a complicated series of incorporations by reference, merely punishes more stringently conduct already illegal under the Marihuana Tax Act and the general customs provisions of Title 19 of the United States Code. Insofar as the Marihuana Tax Act is the basis of illegality for prosecutions under § 176a, § 176a must suffer the same infirmities under the Fifth Amendment as the Marihuana Tax Act itself. But § 176a also may be read to rest in part upon the general customs provisions of Title 19, which provisions may be saved from debility under the Fifth Amendment by the principles set forth in *Shapiro* v. *United States,* 335 U.S. 1 (1948). We contend that § 176a is still a violation of the privilege against self-incrimination notwithstanding the validity of any part of Title 19, and notwithstanding the fact that Title 19 and not § 176a makes illegal the conduct which § 176a seeks to punish, because § 176a is so narrowed in scope of application as to apply to only a small group with ample fears of self-incrimination, and therefore the principles of *Shapiro* v. *United States,* which might save the general customs provisions from infirmity under the Fifth Amendment, cannot be applied by incorporation to § 176a.

The last argument in our brief deals with the presumption of importation contained in § 176a. We contend that the presumption violates the due-process clause of the Fifth Amendment, even if petitioner has not sustained a burden

of proof in showing that the presumption is unreasonable because a high percentage of marihuana is domestically produced. Special rules must apply to this presumption because it concerns an area where no defendant can be expected to have evidence of the origin of any marihuana in his possession, or the kind of information which would allow the judiciary to make the necessary judgment as regards the reasonableness of the presumption.

Because we believe that the arguments put forth in the accompanying brief are important to a decision of the issues raised in the case at bar,[1] under the writ of certiorari granted therein, we therefore request this Honorable Court to grant us leave to file the accompanying brief *Amicus Curiae.*

JOSEPH S. OTERI,
Attorney for
NATIONAL STUDENT ASSOCIATION.

[1] The attorneys for the American Civil Liberties Union have examined the accompanying brief, and join with us in urging that leave to file Amicus Curiae be granted, and further join with us in requesting that all arguments in the accompanying brief which were not covered in their previously filed Amicus brief be considered supplemental thereto.

Supreme Court of the United States.

OCTOBER TERM, 1968.

No. 65.

TIMOTHY F. LEARY,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

BRIEF OF NATIONAL STUDENT ASSOCIATION, AMICUS CURIAE.

Interest of Amicus.

The National Student Association files this brief in the belief that punishment for acquiring marihuana without having paid the $1,000 per ounce regulatory excise tax under the Marihuana Tax Act, or punishment for possession of marihuana imported "contrary to law" under 21 U.S.C. § 176a, violates the Fifth Amendment privilege against self-incrimination.

The National Student Association represents over 350 student-government associations, representing a total enrollment of over 1.7 million students, from every area of the country. It is the only nation-wide generally representative organization concerned with promoting the interests of students.

The National Student Association has for some time been concerned with the social and academic effects of drug and marihuana use among students. It has a large Drug Studies Program which deals exclusively with this problem, which has been supported by a grant from the National Institute of Mental Health during the past year. The National Student Association as an organization is a member of the Executive Committe of the National Coordinating Council on Drug Abuse, Education and Information, and affiliated with the National Sex and Drug Forum.

The specific interest in the National Student Association in the present case is as follows: The case at bar concerns the operation of certain statutes on consumers of marihuana. The young, and especially students, make up a great percentage of marihuana consumers in the United States today. The National Student Association feels that the incidence of application of these statutes to students and potential students is much higher than it is for the general public, and that this supports the interest of the National Student Association as Amicus in the present cases. The National Student Association could not effectively represent the best interests of its constituency if it were not allowed to file a brief offering what it considers new and cogent argument in a case which affects the interests of a large number of its constituents. The National Student Association feels the present scheme of marihuana control by self-incriminatory devices and unreasonable presumptions is a significant causal factor in the cynicism and disrespect for law of significant groups in its constituency, and of the alienation of young people in general.

Summary of Argument.

This brief argues that the Fifth Amendment privilege against self-incrimination should, under the principles of the decisions in *Marchetti* v. *United States*, 390 U.S. 39, 88 S. Ct. 697 (1968), *Grosso* v. *United States*, 390 U.S. 62, 88 S. Ct. 709 (1968), and *Haynes* v. *United States*, 390 U.S. 85, 88 S. Ct. 722 (1968), act as a defense to any charges brought under any section of the Marihuana Tax Act, because that Act seeks to elicit information from persons inherently suspect of criminal activity in an area permeated by criminal statutes, and provides for the maximum cooperation between federal and other prosecutionary authorities for the apprehension of individuals who attempt to comply with its requirements.

Further, this brief argues that the privilege against self-incrimination should also, by the reasoning in the aforementioned cases, provide marihuana importers with a defense to charges under 21 U.S.C. § 176a, for importing marihuana "contrary to law," because, regardless of whether the *basis of illegality* connoted by the term "contrary to law" arises from violations of the narrowly drawn Marihuana Tax Act or from violations of the more general customs provisions of Title 19 of the U.S. Code (the two possible sources of illegality of importation), 21 U.S.C. § 176a, is a statute of narrow application which seeks to elicit incriminatory information from those inherently suspect of criminal activity in an area permeated by criminal statutes and which seeks either to aid state prosecutions with the incriminatory information provided in compliance with the Act, or to punish importers for non-compliance. Insofar as the marihuana importer has imported the marihuana "contrary to law" by a violation of the Marihuana Tax Act, a prosecution for his failure to incriminate himself in compliance with the Import Act is as constitutionally infirm

as a related prosecution for the same failure to incriminate himself in compliance with the Marihuana Tax Act. Insofar as the importer has violated 21 U.S.C. § 176a because of his violation of the general Customs Act, he should still be afforded the Fifth Amendment defense against prosecutions under 21 U.S.C. § 176a, because, notwithstanding the validity of the generally drawn customs provisions of Title 19, 21 U.S.C. § 176a, is so narrowed in scope of application as to apply only to those with ample fears of self-incrimination. The validity of the general customs provisions rests on the Government's legitimate interest in securing information concerning the whole range of foreign commerce for purposes of control and taxation. 21 U.S.C. § 176a, on the other hand, applies to importers, only to compel self-incrimination on threat of criminal sanction. We contend that Congress may not single out a narrow group of persons and pass legislation which acts specifically to compel self-incrimination from that group. Whatever legitimate interests sustain the general customs provisions cannot by incorporation save 21 U.S.C. § 176a.

The whole thrust of *Marchetti* and its companion cases, *supra,* is to make a distinction between laws which are designed to operate generally and require a general form of disclosure as a necessity of taxation or economic or other general control (where some self-incrimination may be an unfortunate by-product in a limited number of cases) and laws where self-incrimination is the *raison d'être* or major focus of the law itself. 21 U.S.C. § 176a, is definitely in the latter category.

21 U.S.C. § 176a, was enacted in order to impose the same sort of registration requirements on those who import marihuana as had already been imposed on machine-gun owners and gamblers. 21 U.S.C. § 176a, has narrowed the scope of Title 19 and imposed a penalty on those falling into this

narrowed group far in excess of anything imposed on the general violator. Congress intended that special enforcement machinery and procedures be developed to enforce § 176a, and this has in fact been the case. Such differential enforcement and penalty, applied to such a narrow group, is conclusive evidence that this narrowing was intended by Congress to provide severe punishment of persons with ample fears of self-incrimination for their refusal to incriminate themselves under state law. In other words, 21 U.S.C. § 176a, operates precisely, as does the Marihuana Tax Act, as a statute narrowly drawn so as to force incrimination; and it is not rendered less odious by virtue of its incorporation of the general customs provisions which are sustainable precisely because of their broad application in an area of general, primarily legitimate, foreign commerce.

The brief further contends that, if the Marihuana Import Act is merely restricted in application to that group who are not actually being prosecuted for refusal to incriminate themselves; that is, those who did not themselves import the marihuana upon which the prosecution is based, and a Fifth Amendment defense is given to those who have actually refused to incriminate themselves, that is, importers, then those who have a legitimate claim to a Fifth Amendment defense will be placed on the horns of an intolerable dilemma, for they must choose between allowing their prosecution for failure to incriminate themselves to go forward, or incriminating themselves under state law by admitting their importership in order to establish their Fifth Amendment defense. Therefore we argue that no convictions should be allowed under § 176a consonant with the Fifth Amendment.

The brief further argues that, even if the Court might otherwise sustain the statute and offer a defense only to

those with actual standing to invoke the privilege (actual importers of marihuana), this would not be inadvisable in the present case, because the statute was directed primarily at actual importers, and there is serious doubt that Congress would have enacted § 176a had it known that its scope would become so constricted that only non-importers of marihuana could be convicted under it, while actual importers escaped scot-free.

Finally, with respect to the presumption of importership contained in 21 U.S.C. § 176a, the brief argues that, while the standard of a "rational connection" between the fact proved and the fact presumed may be appropriate when applied to most presumptions wherein defendants can reasonably be expected to have means of rebuttal if innocent, a much more stringent standard of connection than mere "rational connection"—one approaching the certainty of proof beyond a reasonable doubt which the presumption replaces—is necessary when the presumption affects, as does the presumption in § 176a, a large group of innocent defendants who cannot reasonably be expected to be able to rebut the presumption. Unless a more stringent standard than mere "rational connection" is used, the presumption violates notions of fundamental fairness by convicting large numbers of innocent along with the guilty.

Argument.

I. Preliminary Analyses Necessary to a Full Discussion of the Case at Bar.

A. The Relevant Cases.

In the cases of *Marchetti* v. *United States*, 390 U.S. 39, 88 S. Ct. 697 (1968), *Grosso* v. *United States*, 390 U.S. 62, 88 S. Ct. 709 (1968), and *Haynes* v. *United States*, 390 U.S. 85,

88 S. Ct. 722 (1968), the Supreme Court has made more clear the scope of the protections against self-incrimination under the Fifth Amendment as applied to federal registration tax and disclosure laws in the areas permeated by other federal and state criminal sanctions. The protections afforded by these three cases taken together are directly relevant to the case at bar.

Since the relevant issues here, as in the *Marchetti* case and the two companion cases, are registration, taxation and the Fifth Amendment privilege against self-incrimination, the case before the Court is not one of first impression in the true sense of that phrase. It makes little difference that the substantive crime here involves drugs instead of machine guns or gambling.

In *Marchetti*, petitioner was convicted (1) of conspiracy to evade payment of the annual occupational tax imposed on gambling, under 26 U.S.C. § 4411, and (2) of willful failure to pay the occupational tax and willful failure to register, as required by 26 U.S.C. § 4412. The Court noted that the gambling tax and registration provisions "are part of an interrelated statutory system for taxing wagers" (390 U.S. 39, 42, 88 S. Ct. 699), by which gamblers are required to pay an occupational tax and a 10% excise tax on gross wagers, to submit Internal Revenue forms bearing, *inter alia*, the gambler's name as well as his residence and business address, to register, and to keep daily records open for federal inspection. Moreover, the Court noted that the Internal Revenue Service is "instructed . . . to provide certified copies of the listing [of registrants and the information required by the federal statutes] to any state or local prosecuting officer," pursuant to 26 U.S.C. §§ 4403 and 4423. 390 U.S. 39, 43, 88 S. Ct. 700. Finally, the Court found that "wagering and its ancillary activities are very widely prohibited" with criminal sanctions "under both

federal and state law" (390 U.S. 39, 44, 88 S. Ct. 700), and that "information obtained as a consequence of the federal wagering tax laws is readily available to assist the efforts of state and federal authorities to enforce these penalties." 390 U.S. 39, 47, 88 S. Ct. 702.

In holding convictions under the federal wagering statutes unconstitutional as violative of the Fifth Amendment privilege against self-incrimination, the Court asserted:

> (1) "In these circumstances [those described *supra*], it can scarcely be denied that the obligations to register and to pay the occupational tax created for petitioner 'real and appreciable,' and not merely 'imaginary and unsubstantial,' hazards of self-incrimination." 390 U.S. 39, 48, 88 S. Ct. 702.
>
> (2) (Overruling *Lewis* v. *United States*, 348 U.S. 419 (1955).) "The question is not whether petitioner has a 'right' to violate state law, but whether, having done so, he may be compelled to give evidence against himself. . . . We cannot agree that the constitutional privilege is meaningfully waived merely because those 'inherently suspect of criminal activities' have been commanded either to cease wagering or to provide information incriminating to themselves, and have ultimately elected to do neither." 390 U.S. 39, 51-52, 88 S. Ct. 704.
>
> (3) (Overruling *Lewis* and *United States* v. *Kahringer*, 345 U.S. 22 (1953).) "The hazards of incrimination created by §§ 4411 and 4412 as to future acts are not trifling or imaginary. Prospective registrants can reasonably expect that registration and payment of the occupational tax will significantly enhance the likelihood of their prosecution for future acts . . . Indeed, they can reasonably fear that registration, and acquisition of a wagering tax stamp, may serve as decisive

evidence that they have in fact subsequently violated state gambling prohibitions." 390 U.S. 39, 54, 88 S. Ct. 706.

(4) (In refusing to save the federal statutes by applying use-restrictions.) "The terms of the wagering tax system make it quite plain that Congress intended information obtained as a consequence of registration and payment of the occupational tax to be provided to interested prosecuting authorities.... We must therefore assume that the imposition of use-restrictions would directly preclude effectuation of a significant element of Congress' purposes in adopting the wagering taxes. Moreover, the imposition of such restrictions would necessarily oblige state prosecuting authorities to establish in each case that their evidence was untainted by any connection with information obtained as a consequence of the wagering taxes . . ." 390 U.S. 39, 58-59, 88 S. Ct. 708.

Finally, *Shapiro* v. *United States*, 335 U.S. 1, was distinguished because (1) the records required to be kept there, concerning the wholesale of fruit, were "of the same kind as he has customarily kept," (2) the records were of such a character as to have "public aspects" "analogous to public documents" and "that petitioner, as their custodian, could not assert the privilege as to them," and (3) the requirements at issue in *Shapiro* were imposed in "an essentially non-criminal and regulatory area of inquiry" while those here are directed to a selective group inherently suspect of criminal activities. *Grosso* v. *United States*, 390 U.S. 62, 88 S. Ct. 707, citing *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, 79.

The elimination of the dichotomy between prospective and retrospective incrimination is important in the present

case. Clearly, all laws which seek to extract information from a person about his past criminal deeds are unconstitutional. However, certain laws do not operate to isolate information about past criminal acts, but seek to gain information which will segregate an individual from the aggregate mass of individuals as one who is likely to commit a crime. Since these types of laws, such as the Gambling Tax Act and the National Firearms Act, do not force the individual to divulge any specific information about past crimes, or even depend upon his having committed any past crimes, the Government has always argued that the operation of the statute was prospective, and that therefore the statute was not unconstitutional. In rejecting this dichotomy, the Court has made the test, not a test of retrospectivity, but a test of increased likelihood of future prosecution. Thus, as in *Albertson*, the information required need not be criminal *per se* in all cases, but simply correlate highly with criminal activity, which is another way of saying that the information required pertains to "an area permeated with criminal statutes." If the statute is designed to separate those individuals who are likely to be involved in criminal activity from the mass of humanity by requiring some registraton or declaration, then it is a violation of the Fifth Amendment, whether one conceptualizes the incrimination as retrospective or prospective or both.

Also, it is significant for our purposes to note that with regard to information not usually kept, and in an "area permeated with criminal statutes":

> "The Government's anxiety to obtain information known to a private individual does not without more render that information public; if it did, no room would remain for the application of the constitutional privilege. Nor does it stamp information with a public character that the Government has formalized its de-

mands in the attire of a statute . . .'' 390 U.S. 39, 57, 88 S. Ct. 707.

In *Grosso*, petitioner was convicted for willful failure to pay the excise tax imposed by 26 U.S.C. § 4401, willful failure to pay the special occupational tax pursuant to 26 U.S.C. § 4411, and conspiracy to defraud the United States by evasion of both taxes under 18 U.S.C. § 371. In addition to the divulgence of information required in *Marchetti*, petitioner was required, by Treasury Regulations § 44.6011(a)-1(a), to submit monthly I.R.S. forms containing ''evidence in the most direct fashion . . . of the taxpayer's wagering activities.'' 390 U.S. 62, 63-65, 88 S. Ct. 712.

Moreover, noting Pennsylvania's ''comprehensive statutory system for the punishment of gambling and ancillary activities'' (390 U.S. 62, 64, 88 S. Ct. 711), the Court found that petitioner here, as in *Marchetti*, was involved in an area '' 'permeated with criminal statutes,' where he is 'inherently suspect of criminal activities' '' (390 U.S. 62, 64, 88 S. Ct. 712), and that therefore the hazards of self-incrimination ''can only be characterized as real and appreciable.'' 390 U.S. 62, 66-67, 88 S. Ct. 713.

The Court in *Grosso* relied heavily upon the reasoning in *Marchetti* to rule that the conviction of persons in petitioner's position under these federal statutes was unconstitutional. However, it did present one additional element to the principles set forth in *Marchetti*:

> ''[A]lthough there is no statutory instruction, as there is for the occupational tax, that state and local prosecuting officers be provided listings of those who have paid the excise tax, neither has Congress imposed explicit restrictions upon the use of information obtained as a consequence of payment of the tax. More-

> over, it appears that the Revenue Service, evidently acting under the authority of certain general statutory provisions, has undertaken to tender this information to interested prosecuting authorities. We can only conclude that those liable for payment of the excise tax reasonably may expect that information obtainable from its payment, or from submission of Form 730, will ultimately be proffered to state and federal prosecuting authorities." 390 U.S. 62, 66, 88 S. Ct. 712.

Thus, even absent express statutory provision for federal divulgence, the established federal practice to make such information available to state and federal prosecutors, consonant with the general statutory scheme to enhance convictions, was sufficient to present real and appreciable fear of self-incrimination. Moreover, relying upon the function of the I.R.S. form within the entire federal system of wagering statutes, the Court concluded:

> "[I]t would be inappropriate to impose . . . [use]-restrictions upon one portion of a statutory system, when we have concluded that it would be improper, for reasons discussed in *Marchetti*, to do so upon 'an integral part' of the same system." 390 U.S. 62, 69, 88 S. Ct. 714.

Finally in *Haynes* v. *United States*, petitioner was convicted under 26 U.S.C. § 5851, for knowingly possessing a firearm, defined in 26 U.S.C. § 5848, which had not been registered with the Secretary of the Treasury or his delegate, as required by 26 U.S.C. § 5841. Again the Court was presented with a comprehensive system of imposed taxes and a network of registration and declaration requirements calculated to insure their collection.

And again the Court barred convictions, on Fifth Amendment grounds, under the contested federal statutes. The *Haynes* decision adds several crucial elements to the principles already set forth in *Marchetti* and *Grosso;* and, in order to establish their relevance to the case at bar, it is necessary to reproduce the reasoning in *Haynes* in some detail.

26 U.S.C. § 5851, under which petitioner was convicted, established three distinct requirements:

> "It shall be unlawful for any person to *receive or possess*
> [1] any firearm which has *at any time* been transferred in violation of sections 5811, 5812 (b), 5813, 5814, 5844, or 5846, or
> [2] which has *at any time* been made in violation of section 5821, or
> [3] to *possess* any firearm which has not been registered as required by section 5841."
> [Numbering added for convenience of this argument.]
> [Emphasis supplied.]

As already stated above, Haynes was convicted under the third clause of the section. Relying upon the absence of the phrase "at any time" in the third clause, upon the fact that the third clause proscribes only *possession* (rather than receipt and possession as in clauses [1] and [2]), and upon legislative history, the Court decided that clause [3] does not punish a transferee for a transferor's failure to register (as the Government initially contended), but rather for the transferee's possession of a firearm which he *himself* did not register.

Laboring under this construction of § 5851, the Government then stressed that, while convictions under § 5841, with its express requirement of registration, would fall

under what are now the principles of *Marchetti* and *Grosso*, nevertheless the Government could prosecute under § 5851 [3], which does not expressly require registration but which proscribes *possession* and thereby merely "creates a 'status of unlawful possession' which, if assumed by an individual, denies him the protection of the constitutional privilege." 390 U.S. 85, 95, 88 S. Ct. 729. In other words, the Government urged that, while the failure to register under § 5841 could not be used to prosecute those invoking the Fifth Amendment privilege, nevertheless the Government could, without violating Fifth Amendment principles, convict those who assumed the status of possession of firearms which they should have registered.

The Supreme Court, however, rejected the Government's distinction because, regardless of the fact that § 5851 [3] literally proscribes only possession and § 5841 proscribes failure to register, nevertheless "possession of a firearm and a failure to register are equally fundamental ingredients of both offenses." 390 U.S. 85, 95, 88 S. Ct. 729.

To bolster its argument, the Government then asserted that there were no Fifth Amendment problems, because, in assuming the illegal status of possession, petitioner had waived his Fifth Amendment privilege. However, when the crimes are in fact co-terminal, the Court was as hostile to such fictitious notions of waiver in *Haynes* as it was in *Marchetti*—

> "for reasons discussed in *Marchetti* v. *United States*, decided today . . . we decline to hold that the performance of an unlawful act, even if there exists a statutory condition that its commission constitutes a waiver of the constitutional privilege, suffices to deprive an accused of the privilege's protection. We hold that petioner's conviction under the registration clause of § 5851 is not properly distinguishable from a conviction

under § 5841 for failure to register, and that both offenses must be deemed subject to any constitutional deficiencies under the Fifth Amendment from the obligation to register." 390 U.S. 85, 95, 88 S. Ct. 729.

Haynes is crucial in that it extends the *Marchetti-Grosso* principles in one significant respect: *Marchetti* and *Grosso* rendered conviction void under statutes where failure to register was the express basis of prosecution. In contrast, in the *Haynes* case, § 5851 did not deal expressly with registration requirements. Nevertheless, once having chosen to possess the firearm, an individual could have escaped illegality under § 5851 only by registering. And, since registration was the only means to escape being in the illegal status of possession, then "possession . . . *and a failure to register are equally fundamental ingredients*" (390 U.S. 85, 95, 88 S. Ct. 729) (emphasis supplied), even though registration is not expressly required. In other words, if, having chosen to possess, registration is the only means of escaping illegality, then the requirement of registration will be deemed an essential element of the statute even though it is not *expressly* required. Therefore, if pursuant to *Marchetti* and *Grosso* an individual cannot be convicted for failure to register goods, then likewise he cannot be convicted under a related statute for possession of those same unregistered goods.[1]

[1] Though not crucial to the case at bar, it remains to be said, only to complete the reasoning in *Haynes*, that, since the registration necessary under § 5841 to remove illegal status under § 5851 [3] applied only to those who had not complied under § 5851 [1] or [2], such registration subjected the registrant to immediate prosecution under [1] and [2], and therefore conviction for failure to register under [3] could not be constitutionally upheld. Thus it is significant to note that the danger of incrimination here is not the result of related state statutes, as in *Marchetti* and *Grosso*, but wholly the result of federal legislation.

The relevance of the *Marchetti*, *Grosso* and *Haynes* decisions to the case at bar is manifest. 21 U.S.C. § 176a, and the Marihuana Tax Act under which petitioner has been indicted, are both part of an "interrelated statutory system" designed to "provide more effective means for the eradication of the illicit trafficking in these drugs and for the elimination of the illegal use of these drugs." Conference Report No. 2546, Narcotic Control Act of 1956, U.S. Code Cong. and Admin. News, 84th Cong. 2d Sess. (1956), 3274. As we shall show, compliance with these statutes would subject a defendant to "real and appreciable" fear of self-incrimination in an area "permeated with criminal statutes."

B. The Relevant Statutes.

Before discussing specifically the case at bar, it is necessary to show how the statutes under which petitioner was indicted function within the federal statutory scheme.

21 U.S.C. § 176a provides:

> "Notwithstanding any other provision of law,
> [1] whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or
> [2] smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or
> [3] receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or
> [4] whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years . . . [presumption]. Whenever on

trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

[The clauses have been labelled for the purposes of the following discussion.]

B1. Incorporation of the Basis of Illegality from Other Statutes.

It is crucial to note at the outset that none of the numbered clauses, taken by itself, defines completely the basis of illegality upon which an individual is to be punished. Rather, each clause incorporates by reference and depends upon tests of legality or illegality set out in other statutes or clauses. To demonstrate this fact, it is necessary to examine each of the clauses.

Under § 176a[2], while smuggling or clandestinely introducing marihuana which should have been invoiced is proscribed, there is nothing in § 176a which sets out which marihuana "should have been invoiced." Rather, one must resort to various provisions of the General Customs Act (Title 19 of the U.S. Code), such as 19 U.S.C. §§ 1496 and 1497, requiring the declaration of any article brought into the country and prescribing penalties of forfeiture and fine equal to the value of the article upon failure to declare. *Thomas* v. *United States,* 314 F. 2d 936 (5th Cir. 1963).

Similarly, the proscription under § 176a[1] concerning importing or bringing into the United States marihuana "contrary to law" does not establish what is meant by "contrary to law." Instead, the test for a violation under § 176a[1] depends upon whether the activities in question

are "contrary to law" pursuant to other federal statutory provisions, which § 176a[1] by reference incorporates. These incorporated provisions stem from either the Marihuana Tax Act or the General Customs Act, and involve:

(1) failure of an importer to comply with 26 U.S.C. § 4755, which provides:

> "It shall be unlawful for any person required to register and pay the special tax under the provisions of sections 4751 to 4753, inclusive, to *import*, manufacture, produce, compound, sell, deal in, dispense, distribute, prescribe, administer, or give away marihuana without having so registered and paid such tax." (Emphasis supplied.)

(2) failure of an importer to comply with any of the numerous customs disclosure requirements of the General Customs Act, including the same invoicing requirements upon which § 176a[2], discussed *supra*, is based.

Expressed in other terms, the phrase "contrary to law" in 176a[1] refers to a test or basis of illegality. And it cannot refer to the Smuggling Act or to § 176a[2], because neither statute contains such a test. Instead, the phrase "contrary to law" in § 176a[1] refers to *failure* to comply with the statutory requirements for *lawful* importation which appear only in the Marihuana Tax Act (the tax requirements) and the Customs Act (including, among other disclosure requirements, the invoicing requirements).

Finally, § 176a[3] proscribes receiving, concealing, buying, etc., only that marihuana which was, to the knowledge of the defendant, imported contrary to law. Thus, while § 176a[3] sets forth some elements of a violation thereof, recourse again must be taken to what is "contrary to law" under the Tax Act or the Customs Act.

B2. Constitutionality of Incorporated Marihuana Tax-Act Requirements.

It is clear that an individual may be convicted under § 176a[1] for failure to comply with the Marihuana Tax Act only if he can constitutionally be required to comply with that Act. Similarly, we contend, if an individual who has violated the Tax Act cannot be convicted thereunder consistently with the Fifth Amendment, he cannot be convicted under § 176a[1] for the same failure to comply merely because the requirements were incorporated into the second statute. Otherwise, Congress could circumvent the privilege against self-incrimination merely by enacting an incorporating statute to bolster any statute rendered unenforceable by the privilege.

We intend to show that the Marihuana Tax Act concerns an area permeated with criminal statutes, is aimed at individuals inherently suspect of criminal activities, is supplemented by express authorization for disclosure of information given in compliance therewith to state and federal prosecuting authorities, and was obviously designed to implement the practice of disclosure and cooperation among all authorities, state and federal, to facilitate both state and federal prosecution. Under such circumstances, we contend, individuals are subject to a real and appreciable fear of self-incrimination and may not be compelled to comply with the Tax Act provisions, and may not be convicted for failing to do so, consistently with *Marchetti*. Finally, as stated above, we shall argue that § 176a[1], insofar as it incorporates § 4755 of the Tax Act, cannot be used to avoid whatever Fifth Amendment violations would occur in the enforcement of the Tax Act.

B3. The Unconstitutional Use of Customs Requirements under 21 U.S.C. § 176a.

It should also be noted that, while §176a incorporates bases of illegality from two different statutes, the relationship between § 176a and the incorporated tax requirements, on one hand, and the relationship between § 176a and the incorporated customs requirements, on the other, is rather different.

Both § 176a and the Tax Act explicitly concern marihuana. They apply to the same classes of persons inherently suspect of criminal activity (*i.e.*, those dealing with marihuana) with the same specificity. They are directed toward the same category of activity permeated with criminal statutes and impose roughly comparable penalties. Finally, the legislative history shows, as we shall demonstrate, that the Import Act was enacted to serve along with the Tax Act as an interrelated regulatory system, along with state legislation, to control the trafficking in marihuana.

In sharp distinction, the Title 19 customs provisions are general in scope, governing the importation of all goods, most of which are not the subject of heavy criminal penalties. The Customs Act serves as a general border control provision to regulate vast amounts of legitimate commerce. The penalties imposed for failure to invoice are mere forfeiture and an *ad valorem* fine. While incorporating the customs requirements as one basis of illegality, the Marihuana Import Act is designed to focus upon one importing activity concerning an area permeated by criminal statutes and one class of individuals inherently suspect of criminal activities. Moreover, the information requirements associated with the Marihuana Import Act go far beyond an intent to insure collection of taxes, and were actually intended, as we shall show, to facilitate state and federal

criminal prosecution. In short, while incorporating by reference some general customs provisions, § 176a nevertheless functions in its application to importers of marihuana as the same type of specifically engineered statute as the Marihuana Tax Act. And we shall show that whatever Fifth Amendment problems arise from the prosecution of the failure to invoice marihuana, as distinguished from the failure to register a general class of unspecified goods, cannot be evaded by requiring the invoicing of all goods in one Act and then singling out the area permeated by criminal statutes in another Act and attaching more stringent penalties to it.

B4. Classes of Violators under § 176a.

Bearing this rather complicated system of incorporation in mind, we can now establish three distinct classes of violators who may be indicted under § 176a, each suffering related, but not identical, infringements of the Fifth Amendment privilege as set forth in *Marchetti, Grosso* and *Haynes.*

First, an individual who has failed to comply with the tax and registration requirements of the Tax Act may be indicted under § 176a[1]. For the purpose of verbal economy, persons indicted under such circumstances will be called "tax violators." Second, an individual who has failed to comply with the various customs disclosure requirements might be indicted either under § 176a[1] or (if his customs violation concerns failure to invoice, as is most likely the case) under both § 176a[1] and [2]. Such individuals shall be called "customs violators."

Finally, § 176a[3] may be violated if an individual receives, conceals, buys, facilitates transportation of, etc., marihuana which to his knowledge was imported contrary to law. It is relevant to divide this third class into two

subclasses of people. There are those who receive, transport, etc., who are themselves *not* the importers, but who, by merely *possessing* the marihuana, are presumed to have knowledge of its importation contrary to law. Second, clause [3] of § 176a also extends to actual importers who are themselves tax or customs violators, since it is readily apparent that they know they possess illegally imported marihuana, because they themselves imported it illegally. We shall call these two subclasses of violators of § 176a[3] *non-importers,* who possess marihuana known—or presumably known—by them to have been imported contrary to law; and *importers,* whose failure to take steps to legalize their importation makes their status of possession illegal under [3].

B5. Summary.

With these classes of violators in mind, we intend to show that convictions under 21 U.S.C. § 176a, cannot be constitutionally upheld consistently with the principles set forth in *Marchetti, Grosso* and *Haynes.*

We intend to show—

(1) that, under *Marchetti,* an individual invoking the Fifth Amendment cannot be convicted under the Marihuana Tax Act, and therefore cannot be convicted as a "tax violator" under § 176a;

(2) that, while an individual might, consistent with *Marchetti, Grosso* and *Haynes,* suffer fine and forfeiture for violating the general customs provisions, he may not be convicted, consistent with *Marchetti* and *Grosso,* as a customs violator under § 176a, because, while relying in part upon such general customs provisions, § 176a is so narrowed in its scope of application (*i.e.,* to only marihuana importers) as to pertain only to individuals inherently suspect

of criminal activity in an area permeated by criminal statutes;

(3) that importers may not be constitutionally convicted under § 176a[3] consistently with the principles set forth in *Haynes,* because the essential element in the illegality of their activity under § 176a[3] was their own failure to incriminate themselves under either the Tax Act or the customs disclosure requirements, as improperly narrowed in scope by § 176a;

(4) that no one, whether an importer or a non-importer, may be convicted under § 176a[3], because an individual indicted thereunder cannot be forced to show that he falls within the importer class protected by *Haynes,* without being forced to incriminate himself in open court, contrary to the Fifth Amendment (see *Jones* v. *United States,* 362 U.S. 257);

(5) and, finally, that, even if importers might otherwise merely be accorded a Fifth Amendment defense to charges under § 176a, the portion of § 176a yet viable is too meager a representation of original congressional intent to be salvageable by judicial surgery.

C. Legislative History and Operation of State and Federal Marihuana Laws.

It has already been shown, *supra,* that the importer or bringer of marihuana into the United States, in order to be assured that the marihuana he is importing is not being imported "contrary to law," would have to disclose the marihuana under Title 19, thereby declaring to federal and state officials alike that he is now a possessor of marihuana; and he would have to pay the special tax imposed by the Marihuana Tax Act, 26 U.S.C. § 4751, 4755, thereby putting his name on a list which would quickly and without undue

red tape or expense find its way into the hands of state and municipal narcotic and marihuana law-enforcement agencies.

And, even if the importer succeeds in invoicing his marihuana and paying the tax, while this might satisfy all his requirements and obligations to comply with federal law, it would not absolve him from violation of state laws. In fact, such compliance with federal law would facilitate his prosecution under state law. He would unarguably have reasonable fear of real and appreciable hazard of prosecution growing out of and supported by his compliance with the taxing or invoicing requirements or both.

Yet the overall marihuana legislative scheme is even more comprehensive than our discussion thus far would indicate. Even total compliance with the requirements of the Marihuana Import and Export Act, as well as the Marihuana Tax Act, would still subject the importer to danger of incrimination under additional *federal* statutes. Among the crimes that might be revealed or strongly suggested by disclosure of marihuana at the border are present and past conspiracy to smuggle this or other marihuana into the United States (18 U.S.C. § 371), prior illegal sales and transfers of this or other marihuana (*e.g.*, 21 U.S.C. § 176a), or illegally attempting to reenter the United States without having registered as a convicted narcotics offender (18 U.S.C. § 1407). These offenses, as well as prior illegal exportation (21 U.S.C. § 182), could involve the identical marihuana declared, since it is quite possible for one to obtain marihuana in the United States, carry it across the border, and later reenter with it still in one's possession, as alleged in the case at bar.

This whole array of interlocking and intermingling state and federal statutes did not grow up by accident and without design. The legislative histories of the various state

and federal statutes regarding marihuana give impressive support to the textual statutory indications that complete cooperation was envisaged among all agencies concerned with enforcement of marihuana laws, state and federal.

There is a remarkable similarity between the Marihuana Import Act-Marihuana Tax Act legislation and the National Firearms Act. This is assuredly no accident or happy coincidence, as one can understand from the words of Clinton M. Hester, Assistant General Counsel for the Department of the Treasury, at the time that the Bureau of Narcotics was attempting to get the Marihuana Tax Act adopted by the Congress. As he told the House Committee:

> "The purpose of H.R. 6385 is to employ the Federal taxing power not only to raise revenue from the marihuana traffic, but also to discourage the current and widespread undesirable use of marihuana by smokers and drug addicts and thus drive the traffic into channels where the plant will be put to valuable industrial, medical, and scientific uses. In accomplishing this general purpose two objectives should dictate the form of the proposed legislation: first, the development of a scheme of taxation which would raise revenue and which would also render virtually impossible the acquisition of marihuana by persons who would put it to illicit uses . . .; and, second, the development of an adequate means of publicizing dealings in marihuana in order that the traffic may be effectively taxed and controlled.
>
> "The Harrison Narcotics Act . . . was designed to accomplish these same objectives with reference to opium and coca leaves. . . .
>
> "The same objectives impelled Congress to enact the National Firearms Act. . . . [After reviewing the

provisions of the Firearms Act, Hester continued] . . . Thus, provision was made for publicizing dealings in firearms and for restricting their use to those persons who would have legitimate use for them. . .

"The proposed marihuana bill is something of a synthesis of both of these statutes. . . . The filing of information returns is also required in order to publicize the dealings in the plant." Taxation of Marihuana, Hearings, id. at 7.

Thus Hester emphasized the role of this kind of legislation in bringing illicit activity into the open. He clearly envisioned very few legitimate uses for marihuana, and, while he uses the term "valuable industrial, medical, and scientific uses" of marihuana, the hearings make it clear that the only legitimate uses contemplated are the industrial roles of hemp rope, sterilized hemp birdseed, and hempseed oil and varnish.

As recently as 1956 the report of a House Subcommittee reported that there was an international agreement that marihuana was no longer used in medical practice. Control of Narcotics, Barbiturates and Amphetamines, Hearings before the Subcommittee of the Ways and Means Committee of the House of Representatives, 84th Cong. (1955-1956), 1488-1489.

There is, then, no doubt that the Marihuana Tax Act was passed, as was the National Firearms Act, in order to force dealers in illegal marihuana (or illegal firearms, as the case may be) to reveal themselves and their illegal deeds for purposes of state prosecution.

Next, one must ask why the Marihuana Import and Export Act was passed. The answer lies, partially, in an unusually frank interchange between Senator Price Daniel, then Chairman of the Subcommittee on Improvement in

the Federal Criminal Code, Committee on the Judiciary, United States Senate, and two witnesses before the Subcommittee, Chester A. Emerick, Deputy Commissioner, Bureau of Customs, and Ralph Kelly, Commissioner of the Bureau of Customs. The hearing at which the exchange took place was convened for the purpose of considering passage of § 1404 of S. 3760, 84th Cong., 2d Session, which became incorporated into federal law as 21 U.S.C. § 176a.

The subject of the interchange was the degree of cooperation between federal and state narcotic law-enforcement officials. More specifically, the subject concerned the role of the Bureau of Customs in aiding state marihuana law enforcement. Time and again, Messrs. Emerick and Kelly illustrated, much to Senator Daniel's delight, how customs officials make a practice of turning over to state narcotics authorities people whose names are collected by customs officials because said people are suspected narcotics users who make frequent border crossings. Senator Daniel ventured a guess that the enactment of the new law would facilitate and make more clear the duty of the customs enforcers to turn suspects directly over to state police, especially in states where there exist narcotics laws which are extremely harsh. Mr. Kelly informed the Subcommittee that "we are working much more effectively with the local State enforcement people on narcotics than we have before." Narcotic Control Act of 1956, Hearings, Subcommittee on Improvements in the Federal Criminal Code, Committee on the Judiciary, 84th Cong., 2d Session, on S. 3760, May 4, 1956, 22.

Yet clearly the Subcommittee felt that more attention had to be paid to the marihuana traffic. When Mr. Kelly informed Sen. Daniel that a "suspect list" was kept at certain border crossings, but that this list contained "suspects for all classes of violations of customs laws . . . [although] [u]ndoubtedly there is a large number of addicts

in those records," Sen. Daniel made it clear that it was the *marihuana* traffickers in which the Subcommittee was interested, since "it may cut down a lot of those border crossings, if they know that those records are being kept." Id. at 23. Continued the Senator:

> "I know of nothing that would help our law-enforcement officers more than that—to stop some of this overland traffic better than for those records to be there and *available to law-enforcement officers* [sic]." (Emphasis supplied.) Id. at 24.

Mr. Emerick expressed some skepticism that a narcotics addict would register at the border, since such registration would subject him to state prosecution, inasmuch as "[h]e knows if he registers with a Federal officer as an addict that the information will immediately be turned over to the State." This did not bother Senator Daniels, who made it clear that, while the Subcommittee was delighted with the efforts of Customs officials at border crossings to keep card-index files and lists of suspected narcotics violators, nevertheless the Subcommittee wished to make this record-keeping duty more specific. One might conclude that the somewhat haphazard record-keeping and inspection routines of the Customs officials were not considered sufficient by the Subcommittee to control the specific marihuana traffic.

> "Senator Daniel. We had the same thing up on the gambling tax statute and that argument was made [*i.e.*, that nobody would register, since it would be an admission of a state law violation], but I see a lot of them are still paying the tax and admitting they are violating the State law. Has the gambling tax statute finally been upheld?

"C. Aubrey Gasque (General Counsel for the Subcommittee). Yes, sir.

"Senator Daniel. It has been upheld as a constitutional enactment?

"Mr. Gasque. Yes, sir.

"Senator Daniel. There you have the same consideration. And we took that into consideration in drafting this legislation. I say that is all to the good.[2] If they or if we can have some system of requiring these people to at least give you the information that you have been getting on your own initiative at Laredo. That is what we would like to do—you are doing that on your own initiative. You have no special authority from the Congress to do it. We would try to write into this bill something that will give you authority and direct you to do it at the other places where you are not keeping those records because we felt that something should be done about this matter. It was the greatest surprise to me in our local hearings to find that these known addicts were free to go and come and that no records were being made at most of our border stations. . . . I believe we are in agreement this far, that is that it would be a good thing for you to keep a record of narcotic addicts and known narcotic violators at your border stations." Id. at 27.

Thus Senator Daniel clearly felt that there was some question as to whether the Customs laws then existing (Title 19) were sufficient to empower the Bureau of Customs to keep special records of marihuana smugglers, and that, even if the laws did so empower the Bureau of Customs, a new law, specifically aimed at marihuana, was needed in

[2] "Count no man happy until he is dead." Herodotus, quoting Solon.

order to force the Bureau to make the keeping of such marihuana records and the distribution of information to state police a uniform practice rather than a haphazard, occasional practice at selected border crossings.

In *Marchetti* v. *United States, supra,* the Court noted that, while a gambler could easily comply with all federal gambling requirements by paying his occupational and excise taxes, nevertheless "state and local enactments are more comprehensive." The Court noted that the "laws of every state, except Nevada, include broad prohibitions against gambling, wagering, and associated activities." *Marchetti* v. *United States,* 390 U.S. 39, 44. The Court further noted that not even the minor exceptions to the state gambling laws were sufficient to change the fact that "wagering is 'an area permeated with criminal statutes,' and those engaged in wagering are a group 'inherently suspect of criminal activities.'" *Marchetti* v. *United States,* 390 U.S. 39, 47, 88 S. Ct. 707; quoting *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70, 79.

No state treats marihuana as leniently as Nevada treats gambling and certainly Texas does not. No theoretical exceptions and exemptions in the drug laws of Texas or any other state create of drugs laws an any more meaningful argument against defendant's claim of self-incrimination than was the claim that exemptions and exceptions to the various state gambling laws meant that it was not certain that a registrant or taxpayer under federal law was necessarily incriminating himself under state law. It is sufficient that the area is interlaced with criminality.

From the above discussion it should be apparent that the Marihuana Tax Act and 21 U.S.C. § 176a, were intended as sister statutes in a comprehensive, interrelated federal system designed to effectuate a national policing policy, relying upon prosecutions brought about by feder-

ally coerced disclosure requirements and cooperation between state and federal authorities.

II. Conviction of Violators of the Marihuana Tax Act, and therefore Convictions of Tax Violators under § 176a, Cannot be Constitutionally Upheld Consistently with the Principles of Marchetti.

As we have established *supra*, one basis for prosecuting under § 176a is for an importer's failure to comply with the tax and registration requirements set forth in 26 U.S.C. § 4755(a)(1), which provides:

> "It shall be unlawful for any person required to register and pay the special tax under the provisions of sections 4751 to 4753, inclusive, to *import*, manufacture, produce, compound, sell, deal in, dispense, distribute, prescribe, administer, or give away marihuana without having so registered and paid such tax." (Emphasis supplied.)

Failure to register and pay the tax provides the basis of illegality to prosecute "tax violators," not only under the Marihuana Tax Act, but under § 176a as well.

We maintain, however, that individuals may not be required to comply with the tax and registration requirements of §§ 4751 and 4753 and may not be convicted for failure to do so under the Marihuana Tax Act, because the principles prohibiting such prosecution in *Marchetti* are directly in point.

First, as we have demonstrated in our historical treatment of the Tax Act and the Import Act, the Marihuana Tax Act governs an area of activity permeated with criminal statutes and focuses upon individuals inherently suspect of

criminal violation. In the context of this criminal area, the information required would subject such individuals, inherently suspect of criminal violation, to real and appreciable hazards of self-incrimination under the state legislation.

Moreover, the Marihuana Tax Act includes various provisions expressly authorizing federal authorities to disclose such information to interested prosecuting authorities. The Secretary of the Treasury or his delegate is authorized under § 4754 to require registrants to submit statements and returns specifying the amounts of marihuana handled, and he is also authorized under § 4773 to "furnish . . . copies of any of the said statements or returns" to the "officials of any State or Territory, or of any organized municipality therein, or of the District of Columbia, or any insular possession of the United States, as shall be charged with the enforcement of any law or municipal ordinance regulating the production of marihuana or regulating the sale, prescribing, dispensing, dealing in, or distribution of narcotic drugs or marihuana."

Similarly, § 4775 authorizes the Secretary or his delegate to furnish "to any person, a certified copy of the names of any or all persons who may be listed . . . as special taxpayers," including importers, under § 4751.

Confronted with virtually identical disclosure, registration and tax provisions, and with an equally comprehensive authorization for federal disclosure to state and federal prosecuting authorities, the Supreme Court asserted:

> "In these circumstances, it can scarcely be denied that obligations to register and pay the occupational tax created for petitioner 'real and appreciable,' and not merely 'imaginary and unsubstantial,' hazards of self-incrimination" (390 U.S. 39, 48, 88 S. Ct. 702)—

and refused to save the federal statutes by applying use-restrictions:

> "The terms of the wagering tax system make quite plain that Congress intended information obtained as a consequence of registration and payment of the occupational tax to be provided to interested prosecuting authorities. . . . We must therefore assume that the imposition of use-restrictions would directly preclude effectuation of a significant element of Congress' purposes in adopting the wagering taxes. Moreover, the imposition of such restrictions would necessarily oblige state prosecuting authorities to establish in each case that their evidence was untainted by any connection with information obtained as a consequence of the wagering taxes" (390 U.S. 39, 58-59, 88 S. Ct. 708)—

but instead held that convictions under the Act were void as against individuals asserting the Fifth Amendment privilege.

It is manifest that individuals who cannot constitutionally be convicted under 26 U.S.C. § 5755, for their violations thereunder, also cannot constitutionally be convicted as tax violators under 21 U.S.C. § 176a, which does no more than assign an additional penalty for their same failure to comply. Section 176a governs the same criminal area, is focused upon the same individuals inherently suspect of criminal activity, and incorporates the same information, registration and tax requirements and the same disclosure authorization. Indeed, the legislative history shows that § 176a was enacted to supplement the same general federal systems of statutes designed to facilitate criminal prosecution. The constitutional infirmities of the tax and registration requirements do not evaporate when they operate through incorporation rather than express restatement.

Unless this Court is prepared to see the Fifth Amendment privilege—clearly applicable under the set of circumstances described above—swept away in a swirl of convoluted incorporation, convictions of tax violators under § 176a cannot stand consistently with *Marchetti*.

III. Notwithstanding the Validity of Any Parts of Title 19 of the U.S. Code, Customs Violators may Not be Convicted under 21 U.S.C. § 176a, for Failure to Disclose their Possession or Importation of Marihuana Consistently with the Principles of Marchetti and Grosso.

Before beginning discussion, it would be helpful to recapitulate the conceptual framework used in discussing the customs part of § 176a, under which "customs violators" might be prosecuted.

Customs violators are persons who bring marihuana into the country and do not fulfill one of the importation requirements of Title 19.

All of the Title 19 requirements applicable to marihuana are disclosure requirements.

All of the Title 19 requirements applicable to marihuana are not "invoicing" requirements, however, because some parts of Title 19 require disclosure through some means rather than "invoicing," such as oral declaration, etc. (*e.g.*, see 19 U.S.C. §§ 1304, 1484 and 1552).

Therefore all persons indicted under § 176a[2] for failure to invoice are customs violators.

However, all customs violators do not necessarily violate § 176a[2], since they may not have failed to invoice, but rather to declare in some other technical way. Therefore they would be indicted under § 176a[1] for importing "contrary to law."

Whether a customs violator has violated § 176a[1] and [2] by failure to invoice, or only violated § 176a[1] by failure to disclose his possession of marihuana in some other way, his offense is essentially the same: a refusal to disclose information concerning his activities with respect to or possession of marihuana.

So, when we refer to the customs part of § 176a, we shall refer to that part of § 176a which would be used to indict any person who refused to disclose such information, whether this disclosure was demanded by invoice or otherwise. Rather than speak of invoice requirements, then, we shall speak generally of customs disclosure requirements, which include, but are not limited to, invoicing requirements.

On initial scrutiny the customs parts of § 176a are on all fours with the National Firearms Act in relation to the Fifth Amendment. The disclosures whose refusal is punished under § 176a concern a limited class of goods intimately associated with illegal activity. (Perhaps the case against § 176a is even stronger than was the case against the National Firearms Act on this point. One can much more easily possess a machine gun and not commit a crime under state law than one can now possess marihuana and not commit a crime.) Also, the disclosures with which § 176a is concerned are required of a narrow class of persons inherently suspect of criminal activity in an area permeated by criminal statutes, as pointed out above in the section on the interworkings of the state and federal marihuana laws.

However, the Government might contend that there is a difference between the National Firearms Act and the customs parts of § 176a because an individual is not required to register by mere virtue of his possession, but only on the contingency of his entering the country. His alternatives are therefore not limited to simply a declaration of posses-

sion or else a violation of § 176a. He may choose to remain outside the country, and his choice to enter the country acts as a waiver of the Fifth Amendment; loss of the privilege is a condition of reentry.

The Court in *Marchetti* was not receptive to the various waiver arguments put forth there (see *Marchetti,* 390 U.S. 39, 49-51, 88 S. Ct. 704), and this argument is no more convincing. What sorts of conditions can be imposed on a citizen travelling abroad is not at issue here, except that waiver of the Fifth Amendment should not be one of the permissible conditions. Once a citizen is abroad, moreover, the theory of waiver on reentry is even less acceptable. The reasoning behind such a theory of waiver is faulty on two counts:

(1) The reentry here is an element of the crime; one cannot commit the crime without the reentry; but for the reentry there would be no crime under § 176a. The Government's argument here amounts to no more than its argument in *Marchetti* that the individual is free not to commit the crime. There the Supreme Court said that the Fifth Amendment did not concern the individual's right to commit the crime, but required that, once having chosen to do so, the individual cannot be made to incriminate himself. (See *Marchetti,* 390 U.S. 39, 51, 88 S. Ct. 704.) Therefore, under the Fifth Amendment the Government cannot rely on the fact that he chose to commit the crime to rob him of his Fifth Amendment privilege. It follows necessarily from this that the Government cannot rely on his having chosen to commit any given element of the crime. This again reduces the Fifth Amendment to the formula forbidden under *Marchetti*: refrain from the crime or incriminate yourself. This is unacceptable.

(2) The difference urged between the present case and *Marchetti* is an irrelevant distinction. Exclusion of a citizen from his country is as much a deprivation of funda-

mental liberty as imprisonment. It is as unconstitutional to condition the right of a citizen to return to his home upon a requirement of self-incrimination as it is to condition his right to remain out of prison on such a requirement. The argument of the Government on this point would simply give a person a choice between these two unacceptable limitations on his fundamental freedom. Acceptance of the Government argument would sustain the statute on the ground that the defendant had a choice in the particular way he was to be deprived of his liberty because of his refusal to incriminate himself.

In other words, exclusion from the country is punishment in this context. This type of exile or banishment has always been regarded as a very serious punishment. If this statute were to be sustained simply because the citizen who posesses marihuana could remain outside the country rather than disclose his possession, then the Government would be allowed to impose exile on all individuals who refuse to incriminate themselves under § 176a. As was pointed out by Professor John Mansfield in an article cited with approval by the Supreme Court in the *Marchetti* cases: "If the deprivation is so serious as to impair essential freedom, the case is practically indistinguishable from one where a person is required to report a crime simply because he committed it. The deprivation may be as serious as punishment for failure to report the crime." Mansfield, "The Albertson Case —Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information," 1966 Supreme Court Review 103, 139.

There is a second line of argument the Government might urge in order to save the customs parts of § 176a. This argument is somewhat more complicated and lengthy than the reentry argument just discussed. Therefore it will be convenient to set this argument out here in some detail for

purposes of discussion. The following presentation of this argument will be indented to avoid confusing it with the arguments or views of the Amicus.

The Government might argue along the following line:

> The customs parts of § 176a impose no new registration or disclosure requirements on importers of marihuana which did not exist prior to its enactment. In the case at bar we are considering whether petitioner has been required to incriminate himself in an improper way contrary to the Fifth Amendment. Since the customs registration requirements under Title 19 of the U.S. Code are proper requirements, under the principles of *Shapiro* v. *United States*, 335 U.S. 1, being requirements of a general statute not aimed at specifically self-incriminatory disclosures,[3] their restatement in and incorporation into § 176a does not, without more, render them improper. They are the requirements of a well-established exception to the Fifth Amendment. The hazard of self-incrimination imposed upon an individual is no greater by the passage of the customs parts of § 176a, and would be no less by their abolition. The individual would still be required by law to do exactly the same things he is now required to do under the general Title 19. Since the customs

[3] In citing *Shapiro* v. *United States* here and elsewhere in the brief, we do not thereby wish to indicate approval of the fact that *Shapiro* did not impose a use restriction on disclosures pursuant to a general statute. We believe that this is somewhat explained by the fact that the statute in *Shapiro* was an exercise of the war powers. We further believe that it would be a more proper interpretation of the Fifth Amendment under normal circumstances to impose a use restriction on incriminatory information elicited by the operation of even a general statute. However, we have cited *Shapiro* to show that our argument is valid *even if Shapiro* is accepted as the general standard.

parts of § 176a do not involve any imposition of improper hazards of self-incrimination, but merely restate those acceptable hazards of a general registration requirement, *Marchetti* v. *United States* and its companion cases do not apply.

The situation before us is much different from that in *Marchetti*. There the statutes in question did create new hazards of incrimination by their operation. The tests put forth there were promulgated to answer this question: If a statute creates a new hazard of self-incrimination, under what conditions is that statute's operation contrary to the Fifth Amendment? Creation of a hazard of self-incrimination is antecedent to the operation of the *Marchetti* doctrines.

If an individual may be required to comply with customs disclosure requirements, valid in themselves, then the Government may attach a more severe penalty for failure to comply with such requirements, since the operation of the greater penalty in no way increases the hazards of self-incrimination.

The petitioner urges that the above line of reasoning is constitutionally untenable for the following reasons: While 21 U.S.C. § 176a, incorporated certain criteria of illegality from Title 19, it is not Title 19 nor a part of Title 19. Section 176a was not conceived of by the Legislature as part of a general scheme to tax or account for incoming goods. It is a part of the comprehensive federal scheme to control marihuana. Section 176a is an archetypal specific statute. Standing by itself without Title 19, the Government could have little hope of saving it after *Marchetti*, because on its face it is entirely and totally aimed at a group inherently not simply suspect of, but usually guilty of, criminal

conduct in an area permeated with criminal statutes. The generality of Title 19, furthermore, cannot attach to § 176a because § 176a uses some isolated incorporations from Title 19. If we must tolerate the operation of Title 19 on self-incriminators in a limited number of cases, it is because the very generality of the language of Title 19 is necessary for its satisfactory operation. Also, the very generality of such a law is a built-in safeguard against it becoming a vehicle for the circumvention of the privilege against self-incrimination. Congress will not turn such a law into a means of harshly punishing criminals who refuse to incriminate themselves as long as many members of the non-criminal citizenry might also be affected by the general law's operation. However, if Congress is allowed to use the justification properly applicable only to such general laws to support other statutes aimed only at criminal areas, all of the built-in safeguards inherent in the natural division between "general" and "specific" disappear. Therefore, we need not and should not tolerate § 176a, and its operation upon a group with ample legitimate fears of self-incrimination simply because of the existence of Title 19. The Court in *Marchetti* was quite concerned with the erosion of the Fifth Amendment by what it termed "ingeniously drawn legislation" (*Marchetti,* 390 U.S. 39, 52, 88 S. Ct. 704). If this Court were to decide that such general legislation as Title 19 could be used to save such odious specific legislation as § 176a, it would put a formidable weapon in the hands of the ingenious draftsmen. Consider the following hypothetical:

> Hypothetical statute 1: All persons transporting goods in interstate commerce must register all such goods. Failure to register shall be punished by a fine of one penny or a sentence of one minute in prison, or both.

> Hypothetical statute 2: All persons transporting machine guns in interstate commerce contrary to law shall be punished by a sentence of five years in prison.

By this means the National Firearms Act could be raised from its grave.

At first glance the above hypothetical may seem somewhat frivolous. However, on closer examination one will find that it is an exact analogy of the Government's proposed use of Title 19 to save the customs parts of § 176a.

It must always be borne in mind that general statutes fall under an at best uneasily tolerated exception to the Fifth Amendment. Such statutes should be allowed only under circumstances where the necessity of a routine general registration outweighs the Fifth Amendment considerations which arise in a small percentage of cases under them, and the built-in safeguards of a truly general statute, as explained above, are present. This exception must be strictly limited in application. If the Government is allowed to validate otherwise unconstitutional legislation by placing a general statute behind it, there is a very real chance that the exception will devour the privilege.

If the Government's argument were accepted, then, any time Congress wished to focus on a group and impose disclosure requirements on them contrary to *Marchetti*, they would simply have to pass a general statute as a sop in order to dodge in under the wing of *Shapiro*, and then continue with their specific registration requirements as they had originally intended. Indeed, all that would be necessary to resurrect the National Firearms Act and the Gambling Tax Act would be such a toothless but formally valid general statute. The meaning of the *Marchetti* decisions would be very strange indeed. Instead of creating standards for judging if constitutional rights had been

violated, the *Marchetti* decisions would then simply have created the basis of a legal fiction of general intent, and would be sidestepped *pro forma* by Congress at will.

When a statute such as § 176a is drawn, it is removed from the general context in conception, in intention and in operation, and cannot rely on the close policy judgment sustaining the general statute to justify the narrowed statute, whose whole universe of application as narrowed is only those who have a legitimate fear of incriminating themselves if they do not divulge the information which the statute seeks to drag out of them.

The Fifth Amendment privilege should be "vital not formal" (*Marchetti*, 390 U.S. 39, 53, 88 S. Ct. 705, quoting *Gompers* v. *United States*, 233 U.S. 604, 610).

In order to avoid making the Fifth Amendment privilege an easily evaded formality, and to maintain it as a vital safeguard of individual liberty, this Court should reject the reasoning urged by the Government, and instead consider § 176a on its own merits apart from Title 19. In this form, the customs parts of § 176a, taken alone, are manifestly directed at securing the registration of a group of individuals inherently suspect of criminal activity in an area permeated with criminal statutes, and therefore the Fifth Amendment provides an absolute defense to prosecutions under the customs parts of § 176a.

This same conclusion is reached by thorough examination of the *Marchetti* cases. As we have pointed out above, any other conclusion renders the *Marchetti* decisions almost illusory in protecting the scope of the Fifth Amendment privilege against self-incrimination. We cannot believe that they mean so little. Throughout *Marchetti*, *Grosso* and *Haynes* there runs one underlying rationale: the Fifth Amendment privilege should be construed broadly and protected against subtle attempts at circumvention.

If the *Marchetti* decisions are not meaningless, or are not simply exercises in futile legalism, then their whole thrust must be taken as going towards a distinction between laws which are designed to operate generally and require a general form of disclosure as a necessity of taxation or economic control (where some self-incrimination is an unfortunate by-product in a limited number of cases), and laws where self-incrimination is the *raison d'être* or major focus of the law itself. The customs part of § 176a (in fact, all of § 176a) is definitely in the latter category.

The legislative history shows that § 176a was enacted in order to impose the same sort of registration requirements on those involved with marihuana as had already been imposed on machine-gun owners and gamblers. Section 176a has narrowed the scope of Title 19 and imposed a penalty on those falling into this narrowed scope far in excess of anything imposed on the general violator (five-year mandatory minimum; compare 18 U.S.C. § 545, the General Smuggling Act). Finally, Congress intended that special enforcement machinery and procedures would be developed to enforce § 176a, and this has in fact been the case.

Such differential enforcement and penalty, applied to such a narrow group, is conclusive evidence that § 176a was conceived as a method to punish severely a small group, with ample legitimate fears of self-incrimination, for their refusal to incriminate themselves under state law. The penalty of § 176a itself does not create a different requirement of incrimination from that created under Title 19, but it obviously seeks to single out a group with legitimate fears of incrimination and punish only them for their failure to incriminate themselves. In this way it seeks to make the class of probable self-incriminators change their judgment about the advisability of not incriminating themselves.

Inasmuch as § 176a and its penalty seeks to affect only a group of self-incriminators, and seeks by its operation to change their judgment and force them to incriminate themselves, it cannot be sustained.

The issue is not whether the marihuana is imported contrary to law, nor whether an individual may be prosecuted for failure to render it legal under a general statute. Presumably so long as Title 19 remains, undisclosed marihuana may be imported "contrary to law," and prosecutions may ensue under the General Smuggling Act.

Nor do we dispute that the Government may hike the penalties across the board regarding failure to comply with Title 19 requirements. However, the Government cannot single out the narrow group discussed above as it has done in § 176a, consistent with the *Marchetti* doctrines.

The point is that, notwithstanding the general customs requirements and notwithstanding the fact that the marihuana is imported contrary to law, the narrowed class of individuals subject to § 176a may not be prosecuted thereunder for such importation or possession, consonant with the principles of the *Marchetti* cases.

In other words, a marihuana importer may be prosecuted under the General Smuggling Act, where he is prosecuted as a member of a broad general group for failure to comply with general disclosure requirements. But, if the *Marchetti* decisions mean anything, he may not be prosecuted under § 176a, because under § 176a he is prosecuted as a member of a group inherently suspect of criminal activities in an area permeated by criminal statutes for failure to comply with requirements which, operating within the scope of this statute, serve no other function than to induce self-incrimination.

It remains only to be pointed out that the fact that there is no express statutory authorization for disclosure to state

authorities in relation to the customs parts of § 176a does not render convictions of customs violators more constitutionally acceptable. It is manifest that the customs parts of § 176a are integral parts of the same statutory scheme as the tax part of § 176a. The only distinction between them is that there are no provisions, comparable to 26 U.S.C. §§ 4773 and 4775, authorizing the Secretary of the Treasury or his delegate to furnish information as to custom disclosures. Nevertheless, here, as noted in *Grosso,* "neither has Congress imposed explicit restrictions upon the use of information obtained as a consequence" of such disclosure. 390 U.S. 62, 66, 88 S. Ct. 712.

In view of this language in *Grosso,* and in view of the actual practice of a cooperative exchange of information among state narcotic and federal customs and drug-law enforcement agencies, discussed *supra,* it is clear enough that the failure of the Marihuana Import Act to provide explicitly that the customs disclosures be turned over to state authorities does not diminish the threat to the nondiscloser's privilege against self-incrimination.

Furthermore, one cannot argue that, in view of the Congress's failure to provide explicitly for the distribution of the invoices, etc., to state authorities, this Court should hold merely that, as long as such invoices or the information contained therein are not turned over to state authorities, the invoicer's privilege against self-incrimination is not threatened. As the Supreme Court said in *Grosso,* 390 U.S. 62, 69, 88 S. Ct. 714:

> "Nonetheless, it would be inappropriate to impose such restrictions upon one portion of a statutory system, when we have concluded that it would be improper, for reasons discussed in *Marchetti,* to do so upon "an integral part" of the same system. We

therefore decline to impose the restrictions urged by the United States."

Thus *Marchetti* makes conviction of tax violators impossible under § 176a, while the *Grosso* extension similarly makes conviction of customs violators impossible, provided, of course, that in each case the defendant has properly raised his Fifth Amendment privilege, as has petitioner in the case at bar.

IV. Under the Rule in Haynes, Taken Alone, Importers Charged under § 176a[3] should be Afforded the Fifth Amendment Privilege as a Complete Defense; but Because an Attempt to Assert the Haynes Defense would Itself Necessitate Self-Incrimination under State Law, the Whole of § 176a[3] should be Held Unconstitutional.

One further section of the statute under which petitioner was indicted remains as a possible basis for conviction in the present case. Section 176a[3] expressly on its face imposes no duty to register marihuana, but simply makes it a crime to "receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law . . ."

This is a piece of legislation which this Court might very well term "ingeniously drawn legislation." *Marchetti* v. *United States*, 390 U.S. 39, 52, 88 S. Ct. 704. While appearing to make crimes only of various unrelated acts involving illegal marihuana, the clause so circumscribes the activities of a person with relation to marihuana illegally imported as to make any knowing possession or act of

ownership of such marihuana a crime.[4] Thus the effect of § 176a[3] is to create a basis of prosecution bottomed solely on possession of marihuana imported contrary to law.

As pointed out above, there are two classes of persons who might be charged under § 176a[3]. The first class comprises knowing possessors of illegally imported marihuana who did not themselves import the marihuana, and the second class is made up of knowing possessors of illegally imported marihuana who *themselves* brought the marihuana into the United States contrary to law.

The guilt of those in the first category rests on their receiving into their possession marihuana after its illegal importation by another. The Government might quite correctly make it a crime to receive and possess such illegally imported marihuana. This would only impose a duty on the individual to refrain from accepting into his possession any marihuana whose status under federal law was that of an illegal commodity. Section 176a[3] imposes upon these people no requirement that the individual at any time divulge his decision to break any law under penalty of criminal prosecution.

The second category, however, is comprised of people whose possession of marihuana is contrary to federal law only because they refused to incriminate themselves by complying with the tax and customs disclosure requirements. Had they done these things, their importation would have

[4] In fact, the only circumstances under which an individual, unauthorized by the state to possess marihuana, may possess it legally under § 176a[3] would occur if the marihuana were to fall, or to be shoved, into his hands or clothing without his assent. And then, since it is illegal to conceal, transfer or transport it, he would have to stand immobile, holding the marihuana in plain view forever.

been legal under federal law, and their possession would not be in violation of § 176a[3]. Thus the purpose of punishing *their* possession is specifically to punish their own failure to register.

The Supreme Court faced a problem identical to that presented by the people in group two; that is, importers of marihuana, in *Haynes* v. *United States, supra.* The United States tried to argue in *Haynes* that clause [3] of section 5851 of the National Firearms Act was based on possession of an unregistered firearm, and not on a failure to register. The United States may contend here, as it did in *Haynes*, that prosecution for possession was independent of any requirement of registration, and therefore no Fifth Amendment question was raised by prosecuting for the possession of the illegal commodity. To this the Court said:

> "We find this supposed distinction entirely unpersuasive, for, as we have found, the possession of a firearm and a failure to register are equally fundamental ingredients of both offenses. Second, it has been suggested that § 5841 creates a 'status of unlawful possession' which, if assumed by an individual, denies to him the protection of the constitutional privilege [citations omitted]. It has evidently been thought to follow that the privilege may be claimed in prosecutions under § 5841, but not those under § 5851. This is no less unpersuasive. For the reasons discussed in *Marchetti* v. *United States,* decided today [citation omitted], we decline to hold that the performance of an unlawful act, even if there exists a statutory condition that its commission constitutes a waiver of the constitutional privilege, suffices to deprive an accused of the privilege's protection. We hold that the petitioner's conviction under the registration clause of § 5851 is *not properly*

> *distinguishable* from a conviction under § 5841 for failure to register, and that *both offenses must be deemed subject to any constitutional deficiencies arising under the Fifth Amendment from the obligation to register.*" [Emphasis supplied.] *Haynes* v. *United States,* 390 U.S. 85, 95, 88 S. Ct. 729.

The Government might argue, however, that the situation here is clearly distinguishable from the one in *Haynes* because in *Haynes* the disclosure requirements upon which the possessory crime was based were themselves void under the Fifth Amendment; whereas here the customs disclosure requirements, upon which § 176a[3] relies for its basis of illegality, are presumably not constitutionally defective, at least as applied to the general class of people at whom they are aimed. In *Haynes,* the argument goes, an individual could not be prosecuted for the possessory offense because he could not constitutionally be required to perform the registration necessary to remove the illegality; whereas here, so long as Title 19 remains, the registration which is necessary to remove the illegality punished under § 176a[3] may be constitutionally required of defendants without abridging the Fifth Amendment privilege.

This argument, however, is merely a rephrasing of the one already met with respect to customs violators. The issue is not whether the disclosure requirements of some general statute can be constitutionally sustained as applied to the general population, but rather whether the disclosure requirements can be employed—be it by express reiteration or by reference—in a narrowly drawn statute designed to elicit self-incrimination of individuals from a class inherently suspect of criminal activity in an area permeated by criminal statutes. And we have already established in the

argument regarding customs violators that, while the customs regulations, as applied to the general class of people, may be constitutionally valid, they may not be narrowly employed under § 176a[1] or [2] as the basis of illegality relied upon to prosecute marihuana importers. The question then remains: May importers be prosecuted under § 176a[3] for possession of marihuana, imported contrary to law; when they could not be prosecuted under § 176a[1] or [2] for failing to render it legal?

Here, as in *Haynes,* when one is dealing with those who imported marihuana *themselves,* possession and failure to register are equally fundamental ingredients of the offense, because, *but for* an importer's possession, said importer would not be in violation of [3], and, *but for* an importer's refusal to register, invoice and pay tax, he would also not be in violation of [3], since the marihuana would have been imported contrary to law.

The holding in *Haynes* has broadened the scope of *Marchetti* and *Grosso* considerably. Not only may the Government not prosecute failure to disclose under a statute designed to elicit self-incrimination of those inherently suspect of criminal activities in an area permeated by criminal statutes; but moreover, if a person cannot be prosecuted under a statute, consistently with *Marchetti* and *Grosso,* for his failure to register, then likewise he may not be prosecuted for *possession* under a statute of similar scope and design, even though disclosure is not expressly required and even though the statutory machinery is cloaked in possessory terms.

The Fifth Amendment privilege extends to "both offenses"—to both the offense of not registering and the offense of possessing the thing which is illegal because the possessor refused to register. And this is the situation when an importer of marihuana is prosecuted on the basis

of § 176a[3]. The Fifth Amendment protection cannot be abrogated by making a status of possession the theory of prosecution rather than the failure to register.

Therefore importers who have themselves refused to pay the tax or meet customs disclosure requirements cannot be convicted under § 176a[3] for possession of illegally imported marihuana, since they could not have been prosecuted under § 176a[1] or [2] for their failure to comply with the customs requirements. This is not to say that importers of illegally imported general goods, as distinguished from marihuana, may not be prosecuted under a statute proscribing possession of such goods. We contend here only that prosecutions of marihuana importers under the possessory clause of § 176a—which, as applied to importers, is coterminal with § 176a[1] and [2] in scope of application and design to induce self-incrimination—are no more valid than prosecutions for failure to disclose under § 176a[1] and [2] themselves.

Nor should the fact that § 176a[3] by its language applies to all possessors of illegally imported marihuana, and therefore to some persons who were never required to disclose incriminatory information (transferees of illegally imported marihuana), work to deprive importers of the privilege against self-incrimination. Any possessory statute dealing with goods made illegal by non-registration can include both those who refused to register and their transferees under the term "possessor." The National Firearms Act provisions dealt with in *Haynes, supra,* could have been so interpreted. We submit that the inclusion of transferees in a possessory statute cannot thereby turn the statute into a general statute, or insulate its operation as to those actually required to disclose from the privilege against self-incrimination. If this were enough, all statutes seeking to elicit self-incrimination would be drawn in

possessory terms clearly to include transferees, and we would have but another formalistic rule of draftsmanship. Indeed, an amendment to the National Firearms Act to that effect would bring it back into operation, but the position of non-registrants under it would be the same. The protections afforded by the *Haynes* case would be wholly illusory. We do not believe the Court will sanction such an interpretation. Instead, the inclusion of transferees of non-registrants under a possessory statute should be irrelevant to the determination of the issues of self-incrimination thereunder, and the only question should be the effect of the disclosure requirements on those from whom disclosure is actually required by the operation of the statute. And, as we have shown, § 176a[3] violates the privilege against self-incrimination of all those required to disclose information by its operation—actual importers of marihuana.

What, then, should be done with clause [3] of § 176a? Some individuals chargeable under § 176a[3] are not importers, and their conviction is based on their reception of illegally imported marihuana rather than their refusal to register and incriminate themselves. They would seem to have no grounds to invoke the Fifth Amendment privilege, and no standing to object to proceedings against them under § 176a[3].

However, the survival of any part of § 176a[3] is not dependent on the position of these individuals, but rather on the position in which it places those who have a legitimate Fifth Amendment privilege under *Haynes*, as discussed above. If [3] is left operable as to any persons, then, in order to assert a claim of Fifth Amendment privilege, it would be necessary for a defendant to admit in open court that he himself was the initial importer of the marihuana in question, thus placing himself in a position of self-incrimination *vis-à-vis* state law. To prevent such a situation, either all-

defendants charged under § 176a[3] must be provided with a presumption at law that they were the initial importer, or else [3] is void as unconstitutional, since it in itself creates a necessity to incriminate oneself in order to assert the *Haynes* privilege against self-incrimination, which is available to the person who refused to register the marihuana initially. See *Jones* v. *United States, supra.* To allow the Government to create a situation in which either speaking or keeping silent violates a defendant's right against self-incrimination would put defendants on the horns of an intolerable dilemma. One might argue that a use-restriction on a defendant's admission of importation would solve the problems with [3], but such a solution is unavailable because of the reasoning in *Marchetti,* 390 U.S. 39, 59, 88 S. Ct. 708. Here, as there, the Congress intended information obtained as a consequence of registration and payment on the Marihuana Tax, and the disclosure requirements incorporated into § 176a[3], to be provided to interested prosecuting authorities. This has also, here as there, been the consistent practice. Therefore a significant portion of congressional purpose would be eliminated. Also, here as there, a use-restriction would endanger state prosecutions by forcing the state to rebut the presumption of taint in each case. Even if one were allowed to assert his importership in camera, dismissal of the charges would constitute strong evidence that one was an importer, and certainly alert state officials to be watchful of the defendant. Then, in a future prosecution, the state would be faced with the intolerable burden of proving that its evidence had not grown from the original federal indictment and dismissal, and the notoriety defendant gained as a result of the federal action would increase the likelihood of his prosecution by the state, even if federal charges were dismissed. Also, in any case in which the Government

wished to contest the importership of the defendant, the question would have to be brought to open hearing. By the reasoning of *Marchetti*, a use-restriction on a defendant's admission of importation is not available to save [3] of § 176a.

Thus the choice confronting this Court is one of creating a presumption of being an importer for all defendants charged under § 176a[3] or voiding [3] altogether as a violation of the Fifth Amendment. We submit that a court-created presumption of importership would be unwise because (1) it would change the scope of application of [3] so radically that there is no assurance that Congress would approve the clause in its judicially amended form, and (2) it would run contrary to the accompanying presumptive mandate of the Legislature that unexplained possession is enough to authorize conviction, since, with a presumption of importership, unexplained possession itself could only lead to acquittal under the Fifth Amendment privilege.

Congress might very well choose no convictions at all if given a choice between no convictions and convictions only of transferees, while actual importers would possess illegal marihuana with impunity. There would be a certain unfairness inherent in this situation which makes it very uncertain that Congress would have passed [3] in the form it would be in if the Court supplied a presumption of importership to save it. Given these facts, the Court would be undertaking a very grave form of judicial legislation if it supplied a judicially created presumption of importership. (This argument also applies equally to a use-restriction operating for importers only.)

In summary, the Court must *void* § 176a[3]. It does not suffice to provide a *Haynes*-type defense against conviction under § 176a[3]—as would suffice under § 176a[1] and [2]

—because, in attempting to assert his *Haynes*-defense against self-incrimination, a defendant would incriminate himself under state law.

V. The Use of Forced Disclosure Provisions in the Present Statutes Cannot be Justified by the Government's Greater Interest and Power in the Area of Border Control, because the Government can Adequately Effectuate its Interests by Prohibiting the Importation of Marihuana Entirely.

The Government might also argue that the *Marchetti* cases are distinguishable from the case at bar because in those decisions the Supreme Court was concerned with the taxing power of the Government, which, though considerable, does not amount to the power of absolute prohibition which the Federal Government can evoke against smugglers, in protection of its national borders. According to this argument, the power of the Federal Government to control its borders is essential to its regulation of foreign trade and protection of its citizens, and the border control power far exceeds the more limited tax power employed to effectuate national policing by facilitating state enforcement. Therefore, the argument would run, in a balancing between federal interests and the privilege against self-incrimination, the scales will tip in favor of the Government, since § 176a is reasonably directed toward the legitimate end of border control. Finally, because the Government might have prohibited the importation of marihuana entirely, an individual apprehended under such a prohibitionary statute would suffer the same increased hazard of subsequent state prosecution as under the present statute, since he would likewise be singled out as an individual suspect of criminal ac-

tivity. Therefore, an individual subject to the less-than-prohibitionary provisions of the tax-and-regulation scheme suffers no greater hazards than might be legitimately imposed under a statutory scheme prohibiting the importation of marihuana entirely.

This contention fails for a number of reasons. First, inasmuch as the Marihuana Import Act does *not* prohibit importation of marihuana entirely, but merely utilizes the disclosure requirements of the general customs provisions and the Marihuana Tax Act as a basis for punishing importers, the above argument assumes that the power to prohibit subsumes the power to compel disclosure. Obviously this is not true. A state may proscribe murder, but may not compel disclosure thereof. The balance between interests in regulation and enforcement, on the one hand, and the Fifth Amendment privilege, on the other, is a delicate one, and certainly is not irreversibly upset in favor of coerced disclosure merely because the Government might prohibit an activity about which disclosure is desired.

Petitioner contends, moreover, that the greater power of the Federal Government, with respect to border control, cuts the other way. The Gambling Tax Act and the National Firearms Act were not enacted so much to raise revenue as to prohibit possession of such items as shotguns. Registration and disclosure and reliance upon state prosecution are its chief weapons to effect a national prohibition of non-imported but taxable articles. To this extent there is some interest militating in favor of the Federal Government's power to elicit information and require registration. Indeed, until *Marchetti, Grosso* and *Haynes,* such interest was deemed sufficient to abridge countervailing Fifth Amendment protections. However, in the area of border control, where the Government *does* have the power to prohibit—where it need not have recourse to coerced disclosure to

effectuate its designs—there is not even as much federal interest as was involved in the *Marchetti, Grosso* and *Haynes* cases. With its power to prohibit and punish importation *per se,* the Federal Government need not, and should not, resort to the ill-advised techniques of forced disclosure, sustained by a vast bureaucracy dedicated solely to that end.

Finally, to say that the individual is subject to the same hazards of being singled out as suspect of criminal activity by prohibition is to disregard the fact that such hazard under a prohibitionary statute would not result from coerced self-incrimination. The concern here is not whether individuals might, under a more straightforward border control system, be frequently subject to state prosecution, but whether hazards of state prosecution result by design from coerced disclosure. In the area of border control, where the Government may prohibit importation to adequately effectuate its interests, there is all the more reason not to tolerate the indirections of forced disclosure; which inevitably and unnecessarily cut away at the Fifth Amendment privilege.[5]

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[5] This approach would also significantly clarify congressional intent. If Congress truly intended or intends to prohibit the importation of marihuana, it should do so directly. The convoluted and ambiguous disguises of taxation and import surveillance, in which it has thus far masked its intent, are both unnecessary and unbecoming. One cannot help feeling that, when legislation is devious, someone is trying to hide something unpopular or illegitimate within its dissembling. Thus the demise of § 176a, far from destroying federal power to regulate, may ultimately enhance federal power by eliciting a more direct law, which would in turn probably promote more respect and less cynicism from potential violators.

VI. THE PRESUMPTION IN 21 U.S.C. § 176a, IS VOID BECAUSE THE STANDARD OF "RATIONAL CONNECTION" BETWEEN THE FACT PROVED AND THE FACT PRESUMED IS INAPPROPRIATE TO IT, INASMUCH AS MOST INNOCENT DEFENDANTS CANNOT REASONABLY BE EXPECTED TO REBUT THE PRESUMPTION, AND NO EVIDENCE EXISTS WHICH WOULD SUSTAIN THE PRESUMPTION UNDER ANY MORE STRINGENT STANDARD OF CONSTITUTIONAL SCRUTINY.

21 U.S.C. § 176a, includes the following presumptive language:

> "Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

The test generally used by this Court to determine the validity of statutorily created presumptions has been the following: Such a presumption would not be sustained if there was no "rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from the proof of the other is arbitrary because of lack of connection between the two in common experience. . . . [W]here the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of the courts." *Tot* v. *United States*, 319 U.S. 463, 467-468, 63 S. Ct. 1241, 1245. In the lower courts and in the briefs before this Court, petitioner has presented compelling proofs and arguments which militate for the conclusion that the bulk of marihuana found in the United States is of domestic origin, and that

therefore the presumption of importation in 21 U.S.C. § 176a, violates the traditional "rational connection" standard for presumptions, and should be struck down as a violation of due process of law. In these arguments and conclusions we totally concur.

However, we contend that, even if the Court cannot conclude that petitioner has proved that there is no "rational connection" between the bare existence of a quantity of marihuana and its having been imported, the presumption in § 176a still suffers constitutional infirmity because it is a very special kind of presumption to which the traditional "rational connection" test is inappropriate, and to which a much more stringent standard of constitutional judgment must be applied. There are four elements of a violation of § 176a necessitated by its own language: (1) The performance of a proscribed act *vis-à-vis* a quantity of marihuana; (2) the importation of the marihuana in question; (3) the fact that said importation was not lawful; (4) and the knowledge of the defendant that such marihuana was imported illegally. The language of the presumption in § 176a authorizes a jury to convict if only the first element of the crime is proved. Thus the presumptive language creates not one but three distinct presumptions: A presumption of importation; a presumption that said importation is illegal; and a presumption of knowledge.

The discussion which follows will concern itself only with the presumption of importation. As to the presumption of illegality, if a defendant could be expected to have evidence to rebut the presumption of importation, he would then have evidence of the method of importation and could rebut the presumption of illegality if he were innocent. As to the presumption of knowledge, the innocent defendant can rebut this by his own testimony. Thus these two are garden-variety presumptions to which we are willing to concede that the standard of "rational connection" is applicable.

The presumption of importation itself is a more exotic specimen, and, since it is antecedent to the operation of the other presumptions, the validity of the operation of the presumptive language as a whole must stand or fall with the presumption of importation.

Section 176a does not purport to make illegal by its terms activities with regard to domestic marihuana. The marihuana must be imported "contrary to law." *Therefore possessors of domestically produced marihuana are not guilty of a violation of § 176a.* Further, there are two kinds of possessors of domestic marihuana: those who know the origin of their marihuana because they or someone known to them grew and processed it; and those who possess marihuana which was in fact grown domestically, but who themselves do not know this fact, because they have obtained it from someone unknown by them, or only casually known, who has obtained it from someone else unknown by him, or only casually known, and so forth. Our attack on the presumption rests on certain assertions about the latter group, possessors of marihuana domestic in fact, but who have no knowledge of the origin of their marihuana.

It is only reasonable to assume that nearly all of the possessors of domestically grown marihuana do not know the origin of their marihuana. Marihuana does not come labelled; it is bought clandestinely; sellers are not eager to have their sources known, or even to have their own identities known. There are generally many intervening transactions between producer and ultimate consumer. Unless the Government is willing to claim that the majority of marihuana users "grow their own," then the majority of persons in this country who "conceal" (*i.e.*, possess privately) marihuana are merely consumers, who cannot reasonably be expected to have any evidence or even knowledge of the origin of the marihuana that they conceal (possess). But the presumption in § 176a authorizes conviction on

proof of the first element of the crime. *Most of those who have committed this first element of a violation of § 176a but who are not guilty of an actual violation of § 176a, because the marihuana they possess is of domestic origin, cannot reasonably be expected to have evidence or knowledge of the origin of their marihuana and cannot therefore rebut the presumption by any means, even their own testimony, even though they are innocent of a violation of § 176a.* Because the majority of even those who are innocent cannot be expected to rebut the presumption, the presumption works in such a way as to convict most innocent persons charged under § 176a, as well as the guilty. It has long been an underlying tradition of our law that it is better that one hundred guilty go free than that one innocent person be convicted. We submit that, when a presumption works so that even the innocent cannot reasonably be expected to rebut it, something more than a mere "rational connection" between the fact proved and the fact presumed is necessary to sustain the presumption as constitutional.

We submit that, where a presumption authorizes an inference about the status or condition of an object at a point in time perhaps far removed from the point in time at which the defendant acquired the object, and when the object itself provides no evidence of the prior state inferred (such as importation, in the present case) and when that inference is authorized by the bare possession of the object, then the relationship between the object and its previous status must be more than a mere "rational connection," because in no such case could any individual defendant be expected to provide rebutting evidence if he were innocent. We submit that under such circumstances there must not merely be a "rational connection" between the fact proved and the fact presumed, but there must be a nearly inevitable relation between the fact proved and the fact inferred. If the standard were any lower for this very special category of

presumptions, the Government would be able to convict unjustly almost half of all defendants charged under such a presumption. A "rational connection" is created when experience indicates that sixty cases out of one hundred, or even fifty-one cases out of one hundred, conform to the presumption. Under those circumstances, however, if the innocent charged under the statute cannot reasonably be expected to rebut the presumption, the presumption creates a potential of convicting such a high number of innocent persons that it violates notions of fundamental fairness.

A 51% correlation between the fact proved and the fact presumed would support the conclusion of a "rational connection"; the presumption would operate equally upon the 49% of defendants who were innocent and the 51% who were not, and the saving grace of most presumptions, the ability of the innocent person to rebut the presumption, would not exist in most if not all of the cases. Therefore, although, as in *Tot* and other cases, "a valid presumption may . . . be created upon a view of relation broader than that a jury might take in a specific case" (*Tot, supra,* at page 468), this view of relation should not be nearly as broad as a mere "rational connection" when rebuttal by the innocent cannot reasonably be expected, which is the case with the presumption in § 176a.

When most innocent defendants can reasonably be expected to rebut, the pressures to strike down the presumption and standard of connection between the element of the crime proved and the element presumed need not be as high in order to satisfy our notions of fundamental fairness and due process. A rational connection will suffice. But, when a presumption, as the presumption in § 176a, may operate against a large group of persons who, though innocent, cannot reasonably be expected to have or provide evidence rebutting the presumption, a more stringent standard than mere "rational connection" is necessary in order to satisfy

the due-process requirements of the Fifth Amendment. As we have said, a "rational connection" is merely anything which tends to establish that something is more likely than not. The rational-connection test applied to presumptions does not come near the protection afforded a defendant by the requirement of proof of an element of a crime beyond a reasonable doubt which the presumption replaces. Perhaps this is not so important when the defendant can be expected to have means to rebut if he is innocent. When a presumption is drawn in such a way as to apply to a large group who cannot be expected to have information to rebut the presumption even if they are innocent, however, the standard of connection between the fact proved and the fact presumed should and must more nearly approximate the surety and protection of proof beyond a reasonable doubt which the presumption has replaced.

With the possible exception of *Yee Hem* v. *United States*, 268 U.S. 178, 45 S. Ct. 470 (1925), this Court has never sustained a presumption in a criminal statute which shifted from the prosecution to the defense the burden of proof of an essential element of the crime, which burden the defendant in most instances could not reasonably be expected to be able to sustain if innocent. In every case the innocent defendant could either present his own perhaps convincing testimony to rebut the presumption,[6] or be expected to

[6] *Adams* v. *New York*, 192 U.S. 585, 24 S. Ct. 372 (1904), involved a presumption of knowledge which may be rebutted by *any* innocent defendant's own testimony. *Luria* v. *United States*, 231 U.S. 9, 25, 34 S. Ct. 10, 14 (1913), involved a presumption of non-intent to become a citizen, which may be rebutted by *any* innocent defendant's own testimony. *Hawes* v. *Georgia*, 258 U.S. 1, 42 S. Ct. 204 (1922), involved a presumption of knowledge which may be rebutted by *any* innocent defendant's own testimony. *Casey* v. *United States*, 276 U.S. 413, 48 S. Ct. 373 (1928), involved a presumption of purchase which may be rebutted by *any* innocent defendant's own testimony.

have access to some other effective means of rebuttal if innocent.[7]

Yee Hem concerned a presumption in a statute dealing with opium imported "contrary to law." The presumption was stated almost in the same words as the presumption in § 176a. Although the wording of the two presumptions is almost exactly the same, *Yee Hem* is distinguishable from the present case because the presumption sustained there operated in a different factual context from the one now before the Court.

The presumptive language in *Yee Hem* operated to create, not three, but four distinct presumptions: a presumption of importation; a presumption of illegality; a presumption of knowledge; and a presumption that all opium was imported after April 1, 1909. As to the presumption of illegality and the presumption of knowledge, we have no objection if the other two are sustained, as explained above.

As to the presumption of importation, there was no suggestion in the opinion, or in the briefs, of any significant possibility that opium found in this country had not been imported. Therefore, on the facts presented, the presumption was based upon something much more than a mere rational connection, something conceded by all parties to approach a near inevitability, and therefore much more closely approximating the safeguards of proof beyond a reasonable doubt on a presumed issue which even an innocent defendant could not be reasonably expected to rebut,

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[7] *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S. Ct. 337 (1911), a case involving a civil-penal statute including a presumption that pumping water from mineral wells on one's own property draws water from surrounding property. The presumption was based upon the science of geology, and *any* defendant has recourse to the science of geology to show that the land from which he pumped water did not conform to the presumption.

although the language is couched in terms of "rational connection."

As to the presumption of importation after April 1, 1909, the Court seemed to have been heavily impressed by the fact that fourteen years had passed between 1909 and the *Yee Hem* case. Whatever the infirmities of the presumption might have been when applied to defendants indicted under it at an earlier date, fourteen years seems to be enough time to say that the likelihood of someone not having consumed opium imported prior to 1909 in fourteen years was so low as to approach a clear inevitability, and to be something much more than a mere "rational connection," although the language is again couched in terms of "rational connection."

Thus *Yee Hem* may be distinguished from the present case because there was some indication on the facts of that case that the Court could have sustained the presumption there on a much more stringent standard than mere "rational connection," but chose that language because those were the accepted terms with which to speak of presumptions at the time.

However, even if this distinction does not prove persuasive, we think the presumption in § 176a should be struck down, and *Yee Hem* reversed if necessary.

If *Yee Hem* is read to apply the "rational connection" test to a presumption which a large number of innocent defendants cannot be expected to rebut, then it has no precedent in any case of this Court up to its decision and has not been reaffirmed by any case of this Court since. This in itself might not be such a strong objection to the case if there were any evidence in the *Yee Hem* opinion that the considerations we urge here were even considered by the Court.

It is clear from this opinion that the Court made no distinction between the presumption it faced in *Yee Hem* and a presumption where the innocent defendant *could* be expected to rebut.

The Court gives an example of what it considers to be an analogue to the presumption which it upheld: Possession of the effects of a murdered man may give rise to a presumption which must be rebutted. With all due respect to the Court, in such a case the accused has knowledge concerning whether or not he committed murder in question, and, if innocent, can at least honestly testify in rebuttal in every case. In the case at bar, neither the defendant nor anyone else likely has knowledge of the falsity of the fact presumed, so that even the innocent defendant probably has nothing, not even his own testimony, with which to rebut.

When a presumption works to destroy even this safeguard, it raises grave doubts on due-process grounds. We submit that the willingness of the Court in *Yee Hem* to make the analogy that it did, together with the rest of the language in that opinion, presents clear evidence that the Court in that case did not consciously consider the relevant questions involved in the presumptive language which it faced, and, unless this Court is willing to distinguish *Yee Hem* on its facts as outlined above, we would urge that *Yee Hem* be deemed not to control the case at bar, and if necessary be overruled.

In answer to all this reasoning, the Government might argue that the presumption is within the power of Congress because it simply works to create a duty to know the origin of any marihuana possessed, and thereby makes ignorant possession of marihuana possession at the possessor's peril. This was in part the reasoning used in *Yee Hem* v. *United States.*

If this interpretation of § 176a were accepted, every person would have a duty to ascertain the origin of any marihuana before acquiring it, and to secure proof of its origin which would be sufficient to rebut the presumption. Need we point out that we are now operating in the Never-never Land of legal fiction? Congress certainly did not expect anyone to be able to rebut the presumption, and in fact no defendant on record has to our knowledge successfully rebutted the presumption. The presumption is by intent and operation unrebuttable *de facto* because the probabilities of rebuttal by even the innocent are so low as to be little more than theoretical.

In creating a requirement of the knowledge of origin of all marihuana, we submit that Congress was acting outside its powers, using powers not properly ancillary to the border power or any other power. The effect of the presumption is to reach out to all marihuana, without regard to its importation, or effect on interstate commerce, or any other circumstance which might authorize the exercise of federal power, and create a means of federally prosecuting *any* possessor of *any* marihuana. The effect of the statute is not to reduce the flow of marihuana across the nation's borders, but to create a national contraband law, an exercise of the police power reserved to the states.

If the Government's rationale is accepted by this Court, the role of the Federal Government in legislating what substances shall be forbidden to the individual will become paramount, and there will be no room for the competing opinions which might prevail in the laboratory of the several states to manifest themselves, or for various approaches to the complicated problems of drugs, pornography, alcohol, tobacco, or any other substance which might suffer at some time an unpopularity which elicits the wrath of the Federal Government. As this nation's experience

with the prohibition of alcohol clearly indicates, these decisions are better left to the states, so that a popular hysteria which often arises concerning various substances and activities will less likely prevail on a national level.

We have attacked the presumption in § 176a as an invasion of the police powers of the states. We fervently believe this to be true. However, the Court need not find this in order to find that reading the presumption as creating a requirement of knowledge of origin will not save the presumption. Even if Congress might be deemed to have the power to pass a law making it unlawful to possess marihuana without being able to prove its origin, we submit that, although the language of the presumption operates in fact to do this, and while this operation in fact is a proper subject of judicial scrutiny in order to judge whether the law is an improper exercise of power, nevertheless presumptions should not be read as creating unarticulated substantive crimes in order to save them. While a presumption is void if it operates unconstitutionally, no matter how it was intended, a presumption should not be held valid if it does not operate constitutionally when read as a presumption, but might be constitutional as a substantive law, because the Legislature has simply not written the presumption as a substantive law. For the Court to sustain on this ground would be a form of judicial legislation. As was pointed out by Justice White in *United States* v. *Romano:*

> "According to the Government, however, the 1958 amendments were among other things, designed to overrule *Bozza* and must be viewed as broadening the substantive crime of possession to include all those present at a set-up still who have any connection with the illicit enterprise. So broadened, it is argued, the substantive crime of 'possessing,' under the teachings of

Gainey, could be acceptably proved by showing presence alone.

"We are not persuaded by this argument, primarily because the amendments did not change a word of § 5601(a) (1), which defines the substantive crime. Possession, custody, or control remains the crime which the Government must prove. The amendments, insofar as relevant here, simply added § 5601(b) (1) and permitted an inference of possession from the fact of presence. . . .

. . . . . .

"Congress may have intended by the 1958 amendments to avoid the *Bozza* case. But it chose to do so, not by changing the definition of the substantive crime, but by declaring presence to be sufficient evidence to prove the crime of possession beyond reasonable doubt. This approach obviously fails under the standards traditionally applied to such legislation. It may be, of course, that Congress has the power to make presence at an illegal still a punishable crime, but we find no clear indication that it intended to so exercise this power. The crime remains possession, not presence, and, with all due deference to the judgment of Congress, the former may not constitutionally be inferred from the latter." *United States* v. *Romano*, 382 U.S. 136, 142-144, 86 S. Ct. 279, 283-284 (1965).

In the case before the Court the substantive crime remains possession or other acts in regard to marihuana "imported contrary to law," and *not possession of marihuana without proof of origin.* While the presumption may operate substantively and in fact in such a way as to be an unconstitutional exercise of Congressional power, the fact

that the operation of the presumption might be turned into an otherwise sustainable substantive crime cannot save the presumption if it operates unconstitutionally as drawn, that is, as a presumption. This is the case with the presumption in § 176a.

Conclusion.

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

JOSEPH S. OTERI,
Attorney for NATIONAL STUDENT ASSOCIATION, *Amicus Curiae.*

HARVEY A. SILVERGLATE,
CRANE, INKER & OTERI,
Of counsel.

SUPREME COURT OF THE UNITED STATES

No. 65.—October Term, 1968.

Timothy F. Leary, Petitioner, v. United States.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May 19, 1969.]

Mr. Justice Harlan delivered the opinion of the Court.

This case presents constitutional questions arising out of the conviction of the petitioner, Dr. Timothy Leary, for violation of two federal statutes governing traffic in marijuana.

The circumstances surrounding petitioner's conviction were as follows. On December 20, 1965, petitioner left New York by automobile, intending a vacation trip to Yucatan, Mexico. He was accompanied by his daughter and son, both teenagers, and two other persons. On December 22, 1965, the party drove across the International Bridge between the United States and Mexico at Laredo, Texas. They stopped at the Mexican customs station and, after apparently being denied entry, drove back across the bridge. They halted at the American secondary inspection area, explained the situation to a customs inspector, and stated that they had nothing from Mexico to declare. The inspector asked them to alight, examined the interior of the car, and saw what appeared to be marijuana seeds on the floor. The inspector then received permission to search the car and passengers. Small amounts of marijuana were found on the car floor and in the glove compartment. A personal search of petitioner's daughter revealed a silver snuff box containing semi-refined marijuana and three partially smoked marijuana cigarettes.

Petitioner was indicted and tried before a jury in the Federal District Court for the Southern District of Texas, on three counts. First, it was alleged that he had knowingly smuggled marijuana into the United States, in violation of 21 U. S. C. § 176a.[1] Second, it was charged that he had knowingly transported and facilitated the transportation and concealment of marijuana which had been illegally imported or brought into the United States, with knowledge that it had been illegally imported or brought in, all again in violation of § 176a.[2] Third, it was alleged that petitioner was a transferee of marijuana and had knowingly transported, concealed, and facilitated the transportation and concealment of marijuana, without having paid the transfer tax imposed by the Marijuana Tax Act, 26 U. S. C. § 4741 *et seq.*, thereby violating 26 U. S. C. § 4744 (a)(2).[3]

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[1] Insofar as here relevant, 21 U. S. C. § 176a provides:

"Notwithstanding any other provision of law, whoever, knowingly, and with intent to defraud the United States, imports or brings into the United States marijuana contrary to law, or smuggles or clandestinely introduces into the United States marijuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marijuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned . . . .

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marijuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

[2] See n. 1, *supra*.

[3] Insofar as here relevant, 26 U. S. C. § 4744 (a) provides:

"It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 4741 (a)—

"(1) to acquire or otherwise obtain any marijuana without having paid such tax, or

"(2) to transport or conceal, or in any manner facilitate the

After both sides had presented their evidence and the defense had moved for a judgment of acquital, the District Court dismissed the first or smuggling count.[4] The jury found petitioner guilty on the other two counts. He was tentatively sentenced to the maximum punishment, pending completion of a study and recommendations to be used by the District Court in fixing his final sentence.[5] On appeal, the Court of Appeals for the Fifth Circuit affirmed. 383 F. 2d 851 (1967). That court subsequently denied a petition for rehearing and rehearing *en banc*. 392 F. 2d 220 (1968).

We granted certiorari, 392 U. S. 903 (1968), to consider two questions: (1) whether petitioner's conviction for failing to comply with the transfer tax provisions of the Marijuana Tax Act violated his Fifth Amendment privilege against self-incrimination; (2) whether petitioner was denied due process by the application of the part of 21 U. S. C. § 176a which provides that a defendant's possession of marijuana shall be deemed sufficient evidence that the marijuana was illegally imported or brought into the United States, and that the de-

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transportation or concealment of any marijuana so acquired or obtained."

The statutory scheme of the Marijuana Tax Act is analyzed in more detail at pp. 5–7, *infra*.

[4] Petitioner had testified without contradiction that he had obtained the marijuana in New York, and the District Court apparently reasoned that an article taken out of the United States could not be "smuggled" back into the country, as charged by the indictment. See Joint Appendix 60a; 2 Transcript of Record 520, 685; cf. *United States* v. *Claybourn*, 180 F. Supp. 448, 451–452 (1960).

[5] See 18 U. S. C. § 4208. Petitioner was tentatively sentenced to 20 years in prison and a $20,000 fine for violation of § 176a, and to 10 years in prison and a $20,000 fine for violation of § 4744 (a) (2) (see 26 U. S. C. § 7237 (a)), the prison sentences to run consecutively. The lowest penalty for conviction under § 176a is five years' imprisonment, and no suspension of sentence, probation, or parole is permitted following such a conviction. See 26 U. S. C. § 7237 (d).

fendant knew of the illegal importation or bringing in, unless the defendant explains his possession to the satisfaction of the jury. For reasons which follow, we hold in favor of the petitioner on both issues and reverse the judgment of the Court of Appeals.

I.

We consider first petitioner's claim that his conviction under the Marijuana Tax Act violated his privilege against self-incrimination.

A.

Petitioner argues that reversal of his Marijuana Tax Act conviction is required by our decisions of last Term in *Marchetti* v. *United States*, 390 U. S. 39 (1968), *Grosso* v. *United States*, 390 U. S. 62 (1968), and *Haynes* v. *United States*, 390 U. S. 85 (1968). In *Marchetti*, we held that a plea of the Fifth Amendment privilege provided a complete defense to a prosecution for failure to register and pay the occupational tax on wagers, as required by 26 U. S. C. §§ 4411–4412. We noted that wagering was a crime in almost every State, and that 26 U. S. C. § 6107 required that lists of wagering taxpayers be furnished to state and local prosecutors on demand. We concluded that compliance with the statute would have subjected petitioner to a "'real and appreciable'"[6] risk of self-incrimination. We further recognized that the occupational tax was not imposed in "'an essentially non-criminal and regulatory area . . . .'" 390 U. S., at 57,[7] but was "directed to a 'selective group inherently suspect of criminal activities.'"[8] We found that it would be inappropriate to impose restrictions on use

[6] 390 U. S., at 48, quoting from *Reg.* v. *Boyes*, 1 B. & S. 311, 330 (1861).

[7] 390 U. S., at [illegible], quoting from *Albertson* v. *SACB*, 382 U. S. 70, 79 (1965).

[8] 390 U. S., at 57, quoting from the same source.

of the information collected under the statute—a course urged by the Government as a means of removing the impact of the statute upon the privilege against self-incrimination—because of the evident congressional purpose to provide aid to prosecutors. We noted that, unlike the petitioner in *Shapiro* v. *United States*, 335 U. S. 1 (1948), Marchetti was not required to supply information which had a "public aspect" or was contained in records of the kind he customarily kept.

In *Grosso*, we held that the same considerations required that a claim of the privilege be a defense to prosecution under 26 U. S. C. § 4401, which imposes an excise tax on proceeds from wagering. And in *Haynes* we held for the same reasons that assertion of the Fifth Amendment privilege provided a defense to prosecution for possession of an unregistered weapon under the National Firearms Act, 26 U. S. C. § 5851, despite the fact that in "uncommon" instances registration under the statute would not be incriminating. See 390 U. S., at 96–97, 99.

B.

In order to understand petitioner's contention that compliance with the Marijuana Tax Act would have obliged him to incriminate himself within the meaning of the foregoing decisions, it is necessary to be familiar with the statutory scheme. The Marijuana Tax Act has two main subparts. The first imposes a tax on transfers of marijuana, the second an occupational tax upon those who deal in the drug. It is convenient to begin with the occupational tax provisions, 26 U. S. C. §§ 4751–4753.

Section 4751 provides that all persons who "deal in" marijuana shall be subject to an annual occupational tax. Subsections require that specified categories of persons, such as importers, producers, physicians, researchers, and millers pay varying rates of tax per year. See §§ 4751 (1)–(4), (6). Persons who "deal in" marijuana

but do not fall into any of the specified categories are required to pay $3 per year. See § 4751 (5). Section 4753 provides that at the time of paying the tax the taxpayer must "register his name or style and his place or places of business" at the nearest district office of the Internal Revenue Service.

The first of the transfer tax provisions, 26 U. S. C. § 4741, imposes a tax "upon all transfers of marijuana which are required by § 4742 to be carried out pursuant to written order forms." Section 4741 further provides that on transfers to persons registered under § 4753 the tax is $1 per ounce, while on transfers to persons not so registered the tax is $100 per ounce. The tax is required to be paid by the transferee "at the time of securing each order form."[9] With certain exceptions not here relevant,[10] § 4742 makes it unlawful for any person, "whether or not required to pay a special tax and register under sections 4751 to 4753," to transfer marijuana except pursuant to a written order form to be obtained by the transferee. A regulation, 26 CFR § 152.69, provides that the order form must show the name and address of the transferor and transferee; their § 4753 registration numbers, if they are registered; and the quantity of marijuana transferred. Another regulation, 26 CFR § 152.66, requires the transferee to submit an application containing these data in order to obtain the form. Section 4742 (d) of the Act requires the Internal Revenue Service to "preserve" in its records a duplicate copy of each order form which it issues.

[9] The transferor is secondarily liable for the tax. See 26 U. S. C. § 4741 (b).

[10] The exceptions include transfers by or under prescription of a medical practitioner; legal exportation to foreign countries; transfers to government officials; and transfers of marijuana seeds to persons registered under § 4753.

Another statutory provision, 26 U. S. C. § 4773, assures that the information contained in the order form will be available to law enforcement officials. That section provides that the duplicate order forms required to be kept by the Internal Revenue Service shall be open to inspection by Treasury personnel and state and local officials charged with enforcement of marijuana laws, and that upon payment of a fee such officials shall be furnished copies of the forms.[11]

Finally, 26 U. S. C. § 4744 (a) makes it unlawful for a transferee required to pay the § 4741 (a) transfer tax either to acquire marijuana without having paid the tax or to transport, conceal, or facilitate the transportation or concealment of, any marijuana so acquired.[12] Petitioner was convicted under the latter subsection. He conceded at trial that he had not obtained an order form or paid the transfer tax.

C.

If read according to its terms, the Marijuana Tax Act compelled petitioner to expose himself to a "real and appreciable" risk of self-incrimination, within the meaning of our decisions in *Marchetti*, *Grosso*, and *Haynes*. Sections 4741–4742 required him, in the course of obtaining an order form, to identify himself not only as a transferee of marijuana but as a transferee who had not registered and paid the occupational tax under §§ 4751–4753. Section 4773 directed that this information be

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[11] 26 U. S. C. § 6107, which requires that a list of "persons who have paid special taxes" under subtitles D and E of the Internal Revenue Code be kept for public inspection in each principal internal revenue office and that the list be furnished to state and local prosecutors on request, apparently does not apply to payors of transfer taxes. See *Haynes* v. *United States*, 390 U. S. 85, 99–100 (1968).

[12] The relevant text of § 4744 (a) is set out in n. 3, *supra*.

conveyed by the Internal Revenue Service to state and local law enforcement officials on request.

Petitioner had ample reason to fear that transmittal to such officials of the fact that he was a recent, unregistered transferee of marijuana "would surely prove a significant 'link in a chain' of evidence tending to establish his guilt" [13] under the state marijuana laws then in effect.[14] When petitioner failed to comply with the Act, in late 1965, possession of any quantity of marijuana was apparently a crime in every one of the 50 States, including New York, where petitioner claimed the transfer occurred, and Texas, where he was arrested and convicted.[15] It is

[13] *Marchetti* v. *United States*, 390 U. S. 39, 48 (1968).

[14] It is also possible that compliance with the Act also would have created a substantial risk of incrimination under 21 U. S. C. § 176a, the other federal statute which petitioner was convicted of violating (the relevant text of § 176a is reproduced in n. 1, *supra*). However, the danger of incrimination under state law is so plain that this possibility need not be explored further.

[15] At the time petitioner failed to comply with the Act, 48 States and the District of Columbia had on their books in some form essentially the provisions of the Uniform Narcotic Drug Act. See 9B Uniform Laws Ann. 409–410 (1966). Section 2 of that Act states: "It shall be unlawful for any person to . . . possess . . . any narcotic drug except as authorized in this act." Section 1 (14) defines "narcotic drugs" to include marijuana ("cannabis"). The remaining two States, California and Pennsylvania, also have statutes making it a crime to possess marijuana. See Cal. Code Ann., § 11530 (1961); 35 Pa. Stat. Ann. §§ 780–2 (g), 780–4 (q) (1961).

In 1965, New York and Texas had in effect statutory provisions substantially identical to the above sections of the Uniform Act. For New York, see N. Y. Public Health Law §§ 3301 (21), 3305 (1954); for Texas, see Vernon's Texas Penal Code Ann., Art. 725b §§ 1 (14), 2 (1961). In New York possession of any amount of marijuana was a misdemeanor punishable by up to a year's imprisonment. See N. Y. Penal Law § 1751–a (1) (1954). See also *id.*, § 1751 (2) (1956). In Texas, such possession was a felony punishable by imprisonment for not less than two years and not more than life. See Vernon's Texas Penal Code Ann., Art. 725b, § 23 (1) (1957).

true that almost all States, including New York and Texas, had exceptions making lawful, under specified conditions, possession of marijuana by: (1) state-licensed manufacturers and wholesalers; (2) apothecaries; (3) researchers; (4) physicians, dentists, veterinarians, and certain other medical personnel; (5) agents or employees of the foregoing persons or common carriers; (6) persons for whom the drug had been prescribed or to whom it had been given by an authorized medical person; and (7) certain public officials.[16] However, individuals in the first four of these classes are among those compelled to register and pay the occupational tax under §§ 4751–4753;[17] in consequence of having registered, they are required to pay only a $1 per ounce transfer tax under § 4741 (a)(1). It is extremely unlikely that such persons will remain unregistered, for failure to register renders them liable not only to an additional $99 per ounce transfer tax but also to severe criminal penalties.[18] Persons in the last three classes mentioned above appear to be wholly exempt from the order form and transfer tax requirements.[19]

Thus, at the time petitioner failed to comply with the Act those persons who might legally possess marijuana under state law were virtually certain either to

[16] See, *e. g.*, Uniform Narcotic Drug Act §§ 3–11, 9B Uniform Laws Ann. 472–496 (1966); N. Y. Public Health Law §§ 3310, 3320–3333 (1966); Vernon's Texas Penal Code Ann., Art. 725b, §§ 5–12 (1961).

[17] See 26 U. S. C. §§ 4753 (1)–(6).

[18] See 26 U. S. C. §§ 4755 (a)(1), 4755 (a)(3), 7237 (a).

[19] 26 U. S. C. §§ 4742 (b)(1)–(2) exempt persons who receive marijuana under medical prescription or directly from a medical practitioner. Title 26 U. S. C. § 4742 (b)(4) exempts transfers to public officials. And the design of the Act strongly suggests that a delivery of marijuana to an employee or agent of a registrant is considered a "transfer" to the registrant himself, see 26 U. S. C. § 4755 (b)(3), 26 CFR §§ 152.41, 152.42, and that delivery to a common carrier is considered a "transfer" to the addressee. See 26 U. S. C. § 4755 (b)(2), 26 CFR § 152.127 (c).

be registered under § 4753 or to be exempt from the order form requirement. It follows that the class of possessors who were both unregistered and obliged to obtain an order form constituted "a select group inherently suspect of criminal activities." Since compliance with the transfer tax provisions would have required petitioner unmistakeably to identify himself as a member of this "select" and "suspect" group, we can only decide that when read according to their terms these provisions created a "real and appreciable" hazard of incrimination.

D.

The Government, however, vigorously contends that when the Act is considered together with the accompanying regulations, and in light of existing administrative practice, its incriminatory aspect will be seen to vanish or shrink to less than constitutional proportions. The Government points first to regulations, 26 CFR §§ 152.22, 152.23, added in 1964, which provide that every applicant for registration under §§ 4751–4753 must show that he is legally qualified to deal in marijuana according to the laws of the jurisdiction in which he is operating, and that the district director shall not permit an applicant to register until the director is satisfied that this is true. The Government then cites two other regulations, relating to applications for order forms under § 4742. The first, 26 CFR § 152.67, provides that such applications "[g]enerally . . . shall be signed by the same person or persons signing the application for registration," but when this is impracticable "they may be signed by another person, provided a power of attorney authorizing such other person to sign the applications . . . has previously been filed. . . ." The second regulation, 26 CFR § 152.68, states that upon receipt of an application the district director "shall" compare

the signature on the application "with that appearing on the application for registration or in the power of attorney," and that "[u]nless the district director is satisfied that the application is authentic, it will not be honored."

The Government asserts that these regulations clearly signify that no person will be permitted to register unless his activities are permissible under the law of his jurisdiction, and that no one will be permitted to obtain an order form and prepay the transfer tax unless he has registered.[20] The result, the Government contends, is simply to prohibit nonregistrants like petitioner from dealing in marijuana at all. The Government further asserts that the administrative practice of the Internal Revenue Service and the Bureau of Narcotics has always been consistent with this interpretation, though it concedes that there apparently has never been an attempt by a nonregistrant to prepay the tax. The Government does admit uncertainty as to whether the fact of such an attempt would have been communicated to law enforcement officials; however, it points out that nothing in the statute or regulations appears to compel such disclosure.[21] The Government argues that the regulations and administrative practice effectively refute the existence of a substantial hazard of incrimination at the time petitioner acquired marijuana: first, because a non-

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[20] The Government argues that the $100 per ounce tax was intended to be collected only *civilly*, from those found to have engaged in illegal transfers. See Brief for the United States 19 nn. 23, 29. See also *United States* v. *Sanchez*, 340 U. S. 42 (1951).

[21] After our decisions in *Marchetti*, *Grosso*, and *Haynes*, district directors were instructed that such applications should not be disclosed but simply returned to the applicant. See Brief for the United States 17, n. 16.

registrant would have known that he could not obtain an order form and consequently never would have applied; second, because there was no substantial risk that an unsuccessful application would have been brought to the attention of law enforcement officials.

We cannot accept the Government's argument, for we find that Congress did intend that a nonregistrant should be able to obtain an order form and prepay the transfer tax. This congressional intent appears both from the language of the Act and from its legislative history.

We begin with the words of the statute. Section 4741 (a), when read in conjunction with § 4742, imposes a tax upon every transfer of marijuana, with a few exceptions not here relevant.[22] Section 4741 (a)(1) states that the tax on registrants shall be $1 per ounce and § 4741 (a)(2) that the tax on transfers to nonregistrants shall be $100 per ounce. Section 4741 (b) states that "[s]*uch tax shall be paid by the transferee at the time of securing each order form*, and shall be in addition to the price of such form." (Emphasis added.) Since § 4742 (b) makes no distinction between the § 4741 (a)(1) tax on transfers to registrants and the § 4741 (a)(2) tax on transfers to nonregistrants, it seems clear that Congress contemplated that nonregistrant as well as registrant transferees should be able to obtain order forms and prepay the tax.

The legislative history also strongly indicates that the Act was intended merely to impose a very high tax on transfers to nonregistrants and not to prohibit such transfers entirely. As a taxing measure, the bill of course originated in the House of Representatives. At the start of the first hearing on the bill, before the House Ways and Means Committee, the committee chairman

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[22] See n. 10, *supra*.

announced that he had introduced the bill at the request of the Secretary of the Treasury.[23] The transfer provisions of the bill then read essentially as they do now.[24] The first witness to appear before the Committee was the Treasury Department's Assistant General Counsel, Clinton M. Hester. He began by stating that the bill's purpose was "not only to raise revenue from the marijuana traffic, but also to discourage the current and widespread undesirable use of marijuana by smokers and drug addicts . . . ."[25] He stated that in form the bill was a "synthesis" of the Harrison Narcotics Act, now 26 U. S. C. § 4701 *et seq.*, and the National Firearms Act, now 26 U. S. C. § 5841 *et seq.*[26] Both of these statutes compelled dealers in the respective goods to register and pay a special tax. Both prohibited transfer except in pursuance of a written form and imposed a transfer tax. However, the transfer provisions differed in that the Narcotics Act provided that no one except a registrant could legally obtain an order form, see 26 U. S. C. § 4705 (g), while the Firearms Act merely imposed a $200 tax upon each transfer of a firearm covered by the Act.

The Treasury witness explained that the marijuana tax bill generally followed the plan of the Narcotics Act insofar as it required dealers in marijuana to register and prohibited transfers except by order form. But he testified that because of constitutional doubts:

> "[a]t this point, this bill, like the National Firearms Act, departs from the plan of the Harrison Narcotics Act which limits the right to purchase

[23] See Hearings on H. R. 6385 before the House Committee on Ways and Means, 75th Cong., 1st Sess., 5 (1937).

[24] See *id.*, at 3–5.

[25] *Id.*, at 7.

[26] *Ibid.*

narcotic drugs to persons who are permitted to register under that act.

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> "[I]n order to obviate the possibility of [an] attack upon the constitutionality of this bill, it, like the National Firearms Act, permits the transfer of marijuana to nonregistered persons upon the payment of a heavy transfer tax. The bill would permit the transfer of marijuana to anyone, but would impose a $100 per ounce tax upon a transfer to a person who might use it for purposes which are dangerous and harmful to the public . . . ." [27]

Mr. Hester was also the first witness before the Senate Finance Committee. There he testified in less detail, stating at different points that the purpose of the transfer provisions was "to discourage the widespread use of the drug by smokers and drug addicts," [28] "to render extremely difficult the acquisition of marijuana by persons who desire it for illicit uses," [29] "to prevent transfers to persons who would use marijuana for undesirable purposes," [30] and "through the $100 transfer tax to prevent the drug from coming into the hands of those who would put it to illicit uses." [31]

The House and Senate reports describe the purposes of the transfer provisions largely in the language of

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[27] Hearings on H. R. 6385 before the House Committee on Ways and Means, 75th Cong., 1st Sess., 9 (1937). The doubts about the bill's constitutionality were occasioned by the dissenting opinions in *United States* v. *Doremus*, 249 U. S. 86, 95 (1919), and *Nigro* v. *United States*, 276 U. S. 332, 354, 357 (1928). See Hearings on H. R. 6385, *supra*, at 9.

[28] Hearings on H. R. 6906 before the Senate Committee on Finance, 75th Cong., 1st Sess., 5 (1937).

[29] *Id.*, at 6.

[30] *Id.*, at 6.

[31] *Id.*, at 7.

Mr. Hester's testimony. The House report declares that the purpose was "to discourage the widespread use of the drug by smokers and drug addicts," [32] "to render extremely difficult the acquisition of marijuana by persons who desire it for illicit uses," [33] and "through the $100 transfer tax to prevent the drug from coming into the hands of those who will put it to illicit uses." [34] In discussing the issue of constitutionality, the report recites that "[t]he law is . . . settled that Congress has the power to enact a tax which is so heavy as to discourage the transactions or activities taxed" [35] and states that "[t]hese cases sustain the $100 tax imposed . . . upon transfers . . . to unregistered persons." [36] The Senate report, without discussing constitutionality, otherwise states the purpose of the transfer provisions in the very same words as the House report.[37] Thus, the committee reports confirm Mr. Hester's account of the bill's purposes. In short, the legislative history fully accords with the statutory language.

Upon this evidence, we have no hesitation in concluding that the interpretation which the Government would give to the transfer provisions is contrary to the manifest congressional intent that transfers to nonregistrants be taxed, not forbidden. Insofar as the regulations which require comparison of signatures necessarily compel the result urged by the Government, they must be regarded as contrary to the statute and hence beyond the scope of the regulation-making authority which was delegated by Congress.[38] It is true that these regulations were

[32] H. R. Rep. No. 792, 75th Cong., 1st Sess., 1 (1937).

[33] *Id.*, at 2.

[34] *Id.*, at 2.

[35] *Id.*, at 3.

[36] *Id.*, at 3.

[37] See S. Rep. No. 900, 75th Cong., 1st Sess., 2–3 (1937).

[38] The regulations, 26 CFR §§ 152.22, 152.23, see *supra*, at 10, which limit registration under § 4753 to persons whose marijuana

promulgated in 1937, and that Congress re-enacted the entire Act in 1954, while they were in effect. However, the scanty legislative history accompanying that re-enactment gives no hint that Congress knew of these particular regulations, much less of the indirect impact which the Government now ascribes to them.[39] As we recently noted in *Massachusetts Trustees* v. *United States*, 377 U. S. 235, 241, 242 (1964), congressional re-enactment of the statute, even without any apparent knowledge of a particular regulation, can "strengthen to some extent" the regulation's claim to validity, but re-enactment cannot save a regulation which "contradict[s] the requirement" of the statute itself. When a regulation conflicts with the statute, the fact of subsequent re-enactment "is immaterial, for Congress could not add to or expand the statute by impliedly approving the regulation." *Commissioner* v. *Acker*, 361 U. S. 87, 93 (1959).[40]

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dealings are legal under relevant state and local laws do not of themselves require the result urged by the Government. In fact, there is strong support in the legislative history for the proposition that illicit consumers of marijuana like petitioner are not entitled to register. The House and Senate reports and the testimony of Mr. Hester before the Senate Finance Committee all state, in identical language, that "[u]nder [the bill's] provisions, all legitimate handlers of marijuana are required to pay occupational taxes . . . ." H. R. Rep. No. 792, 75th Cong., 1st Sess., 2 (1937); S. Rep. No. 900, 75th Cong., 1st Sess., 3 (1937); Hearings on H. R. 6906 before the Senate Committee on Finance, 75th Cong., 1st Sess., 6 (1937). In his testimony before the House Ways and Means Committee, Mr. Hester stated explicitly that "those who would consume marijuana are not eligible to register under the bill . . . ." Hearings on H. R. 6385 before the House Committee on Ways and Means, 75th Cong., 1st Sess., 8 (1937).

[39] See H. R. Rep. No. 1337, 83d Cong., 2d Sess., A325 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess., 482–483 (1954).

[40] See also 1 K. Davis, Administrative Law § 5.07 (1958), and cases there cited.

Nor are we persuaded by the Government's argument that its construction has been followed by the Internal Revenue Service and the Bureau of Narcotics ever since the passage of the Act, and that this "long-standing" interpretation by the agencies charged with administering the Act should be controlling. We have often recognized that, as a general matter, a long-standing, contemporaneous construction of a statute by the administering agencies is "entitled to great weight," *FTC* v. *Mandel Bros.*, 359 U. S. 385, 391 (1959), and will be "show[n] great deference," *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965).[41] However, in this instance the Government admits that until our decisions last Term in *Marchetti*, *Grosso*, and *Haynes*, the alleged interpretation had been made known only through the regulations themselves, since there apparently had never been an application by a nonregistrant to prepay the transfer tax. Moreover, in its brief in this Court in *United States* v. *Sanchez*, 340 U. S. 42 (1951), the United States plainly took the position that the Act imposed only a tax and not a prohibition on transfers to nonregistrants,[42] implying that at that time the alleged administrative construction was unknown even to those charged with representing the United States in this Court. In these circumstances, the alleged administrative construction can furnish no additional support for the Government's argument.

The foregoing shows that an the time petitioner acquired marijuana he was confronted with a statute which on its face permitted him to acquire the drug legally, provided he paid the $100 per ounce transfer tax and gave incriminating information, and simultaneously with a system of regulations which, according

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[41] See generally *id.*, § 5.06.

[42] See Brief for the United States, *United States* v. *Sanchez*, 340 U. S. 42 (1951), at 28–29.

to the Government, prohibited him from acquiring marijuana under any conditions. We have found those regulations so out of keeping with the statute as to be *ultra vires*. Faced with these conflicting commands, we think petitioner would have been justified in giving precedence to the higher authority: the statute.[43] "'Literal and full compliance with all the statutory requirements'"[44] would have entailed a very substantial risk of self-incrimination. See *supra*, at 7–10.

The United States has not urged us, as it did in *Marchetti*, *Grosso*, and *Haynes*, to avoid this constitutional difficulty by placing restrictions upon the use of information gained under the transfer provisions. We declined to impose use restrictions in those cases because we found that the furnishing of information to interested prosecutors was a "significant element of Congress' purposes in adopting" the statutes there involved. *Marchetti* v. *United States*, 390 U. S. 39, 59 (1968).[45] The text and legislative history of the Marijuana Tax Act plainly discloses a similar congressional purpose. As has been noted, 26 U. S. C. § 4773 requires that copies of order forms be kept available for inspection by state and local officials, and that copies be furnished to such officials on request. The House and Senate reports both state that one objective of the Act was "the development of an adequate means of publicizing dealings in mari-

[43] Any other holding would give rise to additional knotty questions, such as whether petitioner's nonpayment of the transfer tax should be excused because of his actual or assumed reliance upon the erroneous administrative construction of the statute, under which he would not have been permitted to pay. Cf. *James* v. *United States*, 366 U. S. 213 (1961).

[44] *Grosso* v. *United States*, 390 U. S. 62, 65 (1968), quoting from *Albertson* v. *SACB*, 382 U. S. 70, 78 (1965).

[45] See also *Grosso* v. *United States*, *supra*, at 69; *Haynes* v. *United States*, 390 U. S. 85, 99–100 (1968).

juana in order to tax and control the traffic effectively." [46] In short, we think the conclusion inescapable that the statute was aimed at bringing to light transgressions of the marijuana laws. Hence, as in last Term's cases, we decline to impose use restrictions and are obliged to conclude that a timely and proper assertion of the privilege should have provided a complete defense to prosecution under § 4744 (a)(2).

E.

There remain the further questions whether this petitioner's claim of the privilege was timely and whether it was waived. As for timeliness, petitioner did not assert the privilege as a defense to the § 4744 (a) count until his motion for a new trial. The Court of Appeals evidently regarded the claim as timely, for it rejected it on the merits both in its original opinion and in its denial of rehearing. See 383 F. 2d, at 870; 392 F. 2d, at 221–222. The Government does not contend that the claim of the privilege was untimely. Petitioner's trial occurred before our decisions in *Marchetti*, *Grosso*, and *Haynes*, and the Court of Appeals for the Fifth Circuit had recently rejected an identical self-incrimination claim. See *Haynes* v. *United States*, 339 F. 2d 30 (1964). Although it would have been preferable for petitioner to have asserted the privilege at trial, we hold that in the circumstances of this case his failure to raise the issue at that time did not amount to a waiver of the privilege. See *Grosso* v. *United States*, 390 U. S. 62, 70–71 (1968).

In denying Leary's petition for rehearing, the Court of Appeals, in addition to holding the privilege generally inapplicable to prosecutions under § 4744 (a), found that petitioner's claim of the privilege was improper because

[46] H. R. Rep. No. 792, 75th Cong., 1st Sess., 2 (1937); S. Rep. No. 900, 75th Cong., 1st Sess., 3 (1937).

he "took the stand and affirmatively waived the privilege . . . by testifying fully to the details of his acquisition and transportation of marijuana without having paid the tax . . . ." 392 F. 2d, at 222. In relying for that proposition on the statement in *Marchetti* that our decision in that case would not provide a shield for any taxpayer who was "outside the privilege's protection," 390 U. S., at 61, we think the Court of Appeals misconceived the thrust of that dictum. The aspect of the self-incrimination privilege which was involved in *Marchetti*, and which petitioner asserts here, is not the undoubted right of an accused to remain silent at trial. It is instead the right not to be criminally liable for one's previous failure to obey a statute which required an incriminatory act. Thus, petitioner is not asserting that he had a right to stand mute at his trial but that he cannot be convicted for having failed to comply with the transfer provisions of the Act at the time he acquired marijuana in 1965. His admission at trial that he had indeed failed to comply with the statute was perfectly consistent with the claim that that omission was excused by the privilege. Hence, it could not amount to a waiver of that claim.

The Government suggests that petitioner waived his right to plead self-incrimination in yet another way, by testifying at trial that he had violated the statute for reasons entirely unrelated to fear of self-incrimination. It is true that some portions of petitioner's testimony indicate that his noncompliance was motivated, at least in part, by his conviction that the Act imposed an illegal tax upon religion or upon the "pursuit of knowledge" [47] and by his belief that, in consequence of the system of regulations and administrative practice described above, he would not be permitted to pay the tax.[48] However,

[47] See Joint Appendix 87a–88a, 89a.

[48] See Joint Appendix 86a–89a. Of course, a holding that petitioner waived his right to plead self-incrimination by his reliance on

other parts of petitioner's testimony clearly indicate that he also was influenced by an apprehension that by trying to pay the tax he might incriminate himself.[49] We cannot say that petitioner's testimony, taken as a whole, amounted to a waiver of the privilege. We conclude that petitioner's invocation of the privilege was proper and that it should have provided a full defense to the third count of the indictment. Accordingly, we reverse petitioner's conviction under 26 U. S. C. § 4744 (a)(2).

II.

Next, we consider whether, in the circumstances of this case, the application of the presumption contained in 21 U. S. C. § 176a denied petitioner due process of law.

A.

Insofar as here relevant, § 176a imposes criminal punishment upon every person who:

> "knowingly, with intent to defraud the United States, imports or brings into the United States marijuana contrary to law . . . , or receives, conceals,

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the erroneous administrative interpretation would require consideration of the further question mentioned in n. 43, *supra:* whether such reliance should provide a defense.

[49] When first asked on direct examination why he had not paid the transfer tax, petitioner stated: "Well, I knew that I couldn't get such a permission . . . . I also know that if I had applied for such a [transfer tax] stamp I would probably subject myself to investigation . . . ." Joint Appendix 86a. In response to a similar subsequent question, petitioner said: "I was very certain that I would not be able to pay the tax on the marijuana and that not only would it be taken away from me but I would be subjected to action." Joint Appendix 87a. And when asked whether he had "an honest belief that you could not obtain [an order form]," petitioner replied: "I had a strong and honest belief that I could not get it and it would just cause a lot of publicity and trouble for both the government and myself. And I am not trying to cause trouble . . . ." Joint Appendix 89a.

> buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marijuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law . . . ."

A subsequent paragraph establishes the presumption now under scrutiny:

> "Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marijuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

The second count of the indictment charged petitioner with having violated the "transportation" and "concealment" provisions of § 176a.[50] Petitioner admitted at trial that he had acquired marijuana in New York; had driven with it to Laredo, Texas; had continued across the bridge to the Mexican customs station; and then had returned to the United States. He further testified that he did not know where the marijuana he acquired had been grown.[51]

In view of this testimony, the trial court instructed the jury that it might find petitioner guilty of violating § 176a on either of two alternative theories. Under the first or "South-North" theory, a conviction could have been based solely upon petitioner's own testimony that the marijuana had been brought back from Mexico into the United States and that with knowledge of that fact petitioner had continued to transport it. Under the second or "North-South" theory, the conviction would

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[50] As has been noted, the first count charged him with smuggling in violation of § 176a, but the District Court dismissed that count. See *supra*, at 3 and n. 4.

[51] See Joint Appendix 90a.

have depended partly upon petitioner's testimony that he had transported the marijuana from New York to Texas and partly upon the challenged presumption.[52]

The Government contends that by giving testimony at trial which established all elements of the offense under the "South-North" theory, and by failing to object to the jury instructions on the ground now advanced, petitioner foreclosed himself from raising the point thereafter. We cannot agree. Even assuming that petitioner's testimony did supply all the evidence required for a valid conviction under the "South-North" theory, the jury nevertheless was told that it could alternatively convict with the aid of the presumption under the "North-South" theory. For all we know, the conviction did rest on that ground. It has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside. See, *e. g.*, *Stromberg* v. *California*, 283 U. S. 359 (1931).

It is true that petitioner did not object to the jury instructions on the basis of the presumption's alleged unconstitutionality.[53] However, he did rely upon that ground in his previous motion for a directed verdict at

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[52] With respect to this theory, the trial judge stated near the end of his charge to the jury:

"Now, you might have some difficulty with the question on Count 2 . . . .

"I mention this a second time because you might be confused about the question of importation.

"We are not talking necessarily about the importation or what the government contends was importation here at the bridge.

"The defendant has told us that he received the marijuana in New York. This statute, of course, is of application throughout the land and the presumption would still apply that the narcotic had been imported illegally unless he explains his possession to the satisfaction of the jury." Joint Appendix 103a–104a.

[53] See 2 Transcript of Record 612–614.

the close of the prosecution's case, and urged it again in his subsequent motion for a new trial.[54] Both motions were denied. The Court of Appeals considered petitioner's constitutional argument on the merits, and rejected it. See 383 F. 2d, at 868–870. In these circumstances, we conclude that the question is properly before us.[55]

B.

By what criteria is the constitutionality of the § 176a presumption to be judged?

Early decisions of this Court set forth a number of different standards by which to measure the validity of statutory presumptions.[56] However, in *Tot* v. *United States*, 319 U. S. 463 (1943), the Court singled out one of these tests as controlling, and the *Tot* rule has been

[54] See 1 Transcript of Record 198–200; 2 Transcript of Record 492, 649.

[55] We think it irrelevant that petitioner himself testified at trial that he had no knowledge of the marijuana's origin. The Government put in no affirmative evidence of knowledge, and the jury was instructed that it could convict under the "North-South" theory, relying upon the § 176a presumption to permit an inference of knowledge. The trial judge did not mention petitioner's testimony on this point in his instructions to the jury. Since the presumption is by its terms rebuttable, the intended implication must have been that the jury could convict on the basis of the presumption only if it disbelieved the testimony. Cf. *Caudillo* v. *United States*, 253 F. 2d 513, 518 (1958).

[56] One test was whether there was a "rational connection" between the basic fact and the presumed fact. See *Mobile, J. & K. C. R. Co.* v. *Turnipseed*, 219 U. S. 35 (1910); *McFarland* v. *American Sugar Rfg. Co.*, 241 U. S. 79 (1916); *Western & Atl. R. Co.* v. *Henderson*, 279 U. S. 639 (1929); cf. *Yee Hem* v. *United States*, 268 U. S. 178 (1925). A second was whether the legislature might have made it a crime to do the thing from which the presumption authorized an inference. See *Ferry* v. *Ramsey*, 277 U. S. 88 (1928). A third was whether it would be more convenient for the defendant or for the prosecution to adduce evidence of the presumed fact. See *Morrison* v. *California*, 291 U. S. 82 (1934); cf. *Rossi* v. *United States*, 289 U. S. 89 (1933); *Yee Hem* v. *United States*, *supra*.

adhered to in the two subsequent cases in which the issue has been presented. The *Tot* Court had before it a federal statute [57] which, as construed, made it a crime for one previously convicted of a crime of violence to receive any firearm or ammunition in an interstate transaction. The statute further provided that "the possession of a firearm or ammunition by any such person shall be presumptive evidence that such firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this Act."

The Court, relying upon a prior decision in a civil case,[58] held that the "controlling" test for determining the validity of a statutory presumption was "that there be a rational connection between the facts proved and the fact presumed." 319 U. S., at 467. The Court stated:

> "Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from the proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be rested upon a view of relation broader than a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of courts." 319 U. S., at 467–468 (footnotes omitted).

The *Tot* Court reduced to the status of a "corollary" another test which had some support in prior decisions: [59]

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[57] Section 2 (f) of the Federal Firearms Act, 52 Stat. 1250, 15 U. S. C. § 902 (f).

[58] *Mobile, J. & K. C. R. Co.* v. *Turnipseed*, 219 U. S. 35 (1910).

[59] See n. 56, *supra*.

whether it was more convenient for the defendant or for the Government to supply proof of the ultimate fact which the presumption permitted to be inferred. The Court stated that "[t]he argument from convenience is admissible only where the inference is a permissible one . . . ." 319 U. S., at 469. The Court rejected entirely another suggested test with some backing in the case law,[60] according to which the presumption should be sustained if Congress might legitimately have made it a crime to commit the basic act from which the presumption allowed an inference to be drawn.[61] The *Tot* Court stated simply that "for whatever reason" Congress had not chosen to make the basic act a crime. *Id.*, at 472.

Applying the "rational connection" test, the Court held the *Tot* presumption unconstitutional. The Court rejected the contention that because most States forbade intrastate acquisition of firearms without a record of the transaction or registration of ownership it could be inferred merely from possession that an acquisition which did not meet these requirements must have been interstate, noting the alternative possibilities of unlawful intrastate acquisition and interstate shipment prior to the beginning of state regulation. See *id.*, at 468.[62]

The two subsequent cases in which this Court ruled upon the constitutionality of criminal statutory presumptions, *United States* v. *Gainey*, 380 U. S. 63 (1965), and *United States* v. *Romano*, 382 U. S. 136 (1965), involved companion sections of the Internal Revenue

[60] See *ibid.*

[61] For example, it was argued in *Tot* that in order to regulate interstate commerce in firearms Congress might have prohibited possession of *all* firearms by persons who had been convicted of crimes of violence.

[62] The Court declared that there was even less reason to conclude from possession that the acquisition had occurred subsequent to the effective date of the Firearms Act.

Code dealing with illegal stills. The presumption in *Gainey* was worded similarly to the one at issue here; it permitted a jury to infer from a defendant's presence at an illegal still that he was "carrying on" the business of a distiller "unless the defendant explains such presence to the satisfaction of the jury. . . ." See 26 U. S. C. §§ 5601 (a)(4), 5601 (b)(2).

We held that the *Gainey* presumption should be tested by the "rational connection" standard announced in *Tot*. We added:

> "The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." 380 U. S., at 67.

Applying these principles, we sustained the *Gainey* presumption, finding that it "did no more than 'accord to the evidence, if unexplained, its natural probative force.'" 380 U. S., at 71.

The presumption under attack in *United States* v. *Romano, supra,* was identical to that in *Gainey* except that it authorized the jury to infer from the defendant's presence at an illegal still that he had possession, custody, or control of the still. See 26 U. S. C. §§ 5601 (a)(1), 5601 (b)(1). We held this presumption invalid. While stating that the result in *Gainey* was entirely justified because "[p]resence at an operating still is sufficient evidence to prove the charge of 'carrying on' because anyone present is very probably connected with the illegal enterprise," 382 U. S., at 141, we concluded:

> "Presence is relevant and admissible evidence in a trial on a possession charge; but absent some showing of the defendant's function at the still, its

connection with possession is too tenuous to permit a reasonable inference of guilt—'the inference of the one from proof of the other is arbitrary . . . .'" *Tot* v. *United States*, 319 U. S. 463, 467. *Ibid.*[63]

The upshot of *Tot*, *Gainey*, and *Romano* is, we think, that a criminal statutory presumption must be regarded as "irrational" or "arbitrary," and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.[64] And in the judicial assessment the congressional determination favoring the particular presumption must, of course, weigh heavily.

C.

How does the § 176a presumption fare under these standards?

So far as here relevant, the presumption, quoted *supra*, at 22, authorizes the jury to infer from a defendant's possession of marijuana two necessary elements of the crime: (1) that the marijuana was imported or brought into the United States illegally; and (2) that the de-

[63] Like the Court in *Tot*, we limited ourselves in *Romano* to consideration of the crime Congress actually had defined. We observed that Congress had not chosen to make presence at an illegal still a crime in itself, but had only "declar[ed] presence to be sufficient evidence to prove the crime of possession beyond a reasonable doubt," and concluded that "[t]his approach obviously fails under the standards traditionally applied to such legislation." 382 U. S., at 144.

[64] Since we find that the § 176a presumption is unconstitutional under this standard, we need not reach the question whether a criminal presumption which passes muster when so judged must also satisfy the criminal "reasonable doubt" standard if proof of the crime charged or an essential element thereof depends upon its use. Cf. *United States* v. *Adams*, 293 F. Supp. 776, 783–784 (1968). See also *United States* v. *Romano*, *supra*, at 140–144; Note, The Constitutionality of Statutory Criminal Presumptions, 34 U. Chi. L. Rev. 141 (1966).

fendant knew of the unlawful importation or bringing in.[65] Petitioner argues that neither inference is valid, citing undisputed testimony at his trial to the effect that marijuana will grow anywhere in the United States, and that some actually is grown here.[66] The Government contends, on the other hand, that both inferences are permissible. For reasons that follow, we hold unconstitutional that part of the presumption which relates to a defendant's knowledge of illegal importation. Consequently, we do not reach the question of the validity of the "illegal importation" inference.

With regard to the "knowledge" presumption, we believe that *Tot* and *Romano* require that we take the statute at face value and ask whether it permits conviction upon insufficient proof of "knowledge," rather than inquire whether Congress might have made possession itself a crime.[67] In order thus to determine the constitutionality of the "knowledge" inference, one must have direct or circumstantial data regarding the beliefs of marijuana users generally about the source of the drug they consume. Such information plainly is "not within specialized judicial competence or completely commonplace," *United States* v. *Gainey, supra,* at 67. Indeed, the presumption apparently was enacted to relieve the Government of the burden of having to adduce such evidence at every trial, and none was introduced by the

[65] The presumption also permits inference of a third element: that the importation or bringing in was with intent to defraud the United States. The permissibility of this inference was not one of the questions presented in Leary's petition for certiorari, and on the view we take of this branch of the case we have no occasion to consider it.

[66] See 1 Transcript of Record 165, 186–187. Petitioner attempted to introduce further evidence concerning the proportion of domestically consumed marijuana which in fact has been grown in the United States, but the District Court held it irrelevant and therefore inadmissible. See 2 Transcript of Record 517.

[67] See *supra,* at 26 and n. 63.

prosecution at petitioner's trial. Since the determination of the presumption's constitutionality is "highly empirical," *ibid.*, it follows that we must canvass the available, pertinent data.

Of course, it must be kept in mind that "significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." *Ibid.* However, it quickly becomes apparent that the legislative record does not supply an adequate basis upon which to judge the soundness of the "knowledge" part of the presumption. We have therefore taken other materials into account as well, in an effort to sustain the presumption. In so doing, we have not confined ourselves to data available at the time the presumption was enacted in 1956, but have also considered more recent information, in order both to obtain a broader general background and to ascertain whether the intervening years have witnessed significant changes which might bear upon the presumption's validity.[68]

As has been noted, we do not decide whether the presumption of illegal importation is itself constitutional. However, in view of the paucity of direct evidence as to the beliefs of marijuana smokers generally about the souce of their marijuana, we have found it desirable to survey data concerning the proportion of domestically consumed marijuana which is of foreign origin, since in the absence of better information the proportion of marijuana actually imported surely is relevant in deciding whether marijuana possessors "know" that their marijuana is imported.

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[68] A statute based upon a legislative declaration of facts is subject to constitutional attack on the ground that the facts no longer exist; in ruling upon such a challenge a court must, of course, be free to re-examine the factual declaration. See *Block v. Hirsh*, 256 U. S. 135, 154–155 (1921); *Communist Party* v. *SACB*, 367 U. S. 1, 110–114 (1961).

D.

Since the importation question is a subsidiary one, we take it up first, beginning, of course, with the legislative history of § 176a. The House and Senate committee reports and the floor debates are relatively unhelpful.[69] More informative are the records of extensive hearings before House and Senate committees.[70] Near the outset of the Senate committee hearings, the then Commissioner of Narcotics, Harry J. Anslinger, estimated that 90% of all marijuana seized by federal authorities had been smuggled from Mexico, and that "although there is considerable volunteer growth from old plantings in the Middle West . . . , [t]here is very little of the local land used because it just does not have the advantage of the long summer growing and [domestic marijuana] is not as potent as the Mexican drug."[71] A number of officials responsible for enforcing the narcotics laws in various localities estimated that a similar proportion of the marijuana consumed in their areas was of Mexican origin.[72]

On the other hand, written material inserted in the record of the Senate hearings included former testimony

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[69] See S. Rep. No. 1197, 84th Cong., 2d Sess., 7, 13 (1956); H. R. Rep. No. 2388, 84th Cong., 2d Sess., 3, 6 (1956); H. R. Rep. No. 2546, 84th Cong., 2d Sess., 14 (1956) (conference report); 102 Cong. Rec. 269, 271, 9015, 10688, 12166.

[70] Hearings on Traffic in Narcotics before a Subcommittee of the House Committee on Ways and Means, 84th Cong., 1st Sess. (1955) (hereinafter cited as House Hearings); Hearings on Illicit Narcotics Traffic before the Subcommittee on Improvements in the Federal Criminal Code of the Senate Committee on the Judiciary, 84th Cong., 1st Sess. (1955) (hereinafter cited as Senate Hearings).

[71] Senate Hearings 18.

[72] See House Hearings 618, 1071; Senate Hearings 2384, 2471–2472, 4370, 4630. See also House Hearings 889; Senate Hearings 2893, 3488–3490; 102 Cong. Rec. 269, 271.

of an experienced federal customs agent before another Senate committee, to the effect that high-quality marijuana was being grown near the Texas cities of Laredo and Brownsville.[73] A written report of the Ohio Attorney General recited that marijuana "may grow unnoticed along roadsides and vacant lots in many parts of the country," [74] and a Philadelphia Police Academy bulletin stated that "Plenty of [marijuana] is found growing in this city." [75]

Examination of periodicals and books published since the enactment of the presumption leaves no doubt that in more than a dozen intervening years there have been great changes in the amount and nature of marijuana use in this country. With respect to quantity, one readily available statistic is indicative: the amount of marijuana seized in this country by federal authorities has jumped from about 3,400 pounds in 1956 to about 61,400 pounds in 1967.[76] With regard to nature of use, the 1955 hearing records and other reports portray marijuana smoking as at that time an activity almost exclusively of unemployed or menially employed members of racial minorities.[77] Current periodicals and books, on the other hand, indicate that marijuana smoking has

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[73] See Senate Hearings 3488–3489.

[74] *Id.*, at 4814.

[75] *Id.*, at 599. See also Senate Hearings 4167.

[76] Compare Bureau of Narcotics, Report on the Traffic in Opium and Other Dangerous Drugs 66 (1956), with *id.*, at 43 (1967). These seizures are estimated to represent 10% of the marijuana actually smuggled into the United States. See Joint Appendix 92a.

[77] See, *e. g.*, J. Rosevear, Pot: A Handbook of Marijuana 118 (1967); Bouquet: Cannabis, Parts III–V, 3 Bull. on Narcotics, No. 1, at 32–33 (1951); Mayor's Committee on Marijuana, The Marijuana Problem in the City of New York 17–25 (1944); Blum, Mind-Altering Drugs and Dangerous Behavior: Dangerous Drugs 24, in President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Narcotics and Drug Abuse (1967).

become common on many college campuses and among persons who have voluntarily "dropped out" of American society in protest against its values, and that marijuana smokers include a sizeable number of young professional persons.[78]

Despite these undoubted changes, the materials which we have examined point quite strongly to the conclusion that most domestically consumed marijuana is still of foreign origin. During the six years 1962–1967, some 79% of all marijuana seized by federal authorities was seized in attempted smuggling at ports and borders.[79] The Government informs us that a considerable part of the internally seized marijuana bore indications of foreign origin.[80] While it is possible that these facts reflect only the deployment of federal narcotics forces, rather than the actual proportion of imported to domestic marijuana, almost all of the authorities which we have consulted confirm that the preponderance of domestically consumed marijuana is grown in Mexico.[81]

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[78] See, *e. g.*, J. Rosevear, *supra*, at 117–132 (1967); Bureau of Narcotics, Report on the Traffic in Opium and Other Dangerous Drugs 2, 40 (1966); Blum, *supra*, at 24; Cahn, The User and the Law, in J. Simmons (ed.), Marijuana: Myths and Realities (1967); McGlothlin, Toward a Rational View of Marijuana 195–198, in J. Simmons (ed.), *supra*.

[79] See Bureau of Narcotics, Report on the Traffic in Opium and Other Dangerous Drugs 66 (1962); *id.*, at 28 (1963); *id.*, at 84 (1964); *id.*, at 51 (1965); *id.*, at 45 (1966); *id.*, at 43 (1967).

[80] See Brief for the United States 40.

[81] See, *e. g.*, Bureau of Narcotics, Report on the Traffic in Opium and Other Dangerous Drugs 36 (1963); *id.*, at 30 (1964); Mandel, Myths and Realities of Marijuana Pushing 58–110, in J. Simmons (ed.), Marijuana: Myths and Realities (1967); President's Commission on Law Enforcement and the Administration of Justice, Report: The Challenge of Crime in a Free Society 213 (1967); J. Simmons (ed.), *supra*, at 233; United States Government, Report on the Working of the International Treaties on Narcotiic Drugs 17 (1966); *id.*, at 24–25 (1967). Contra, see 1 Transcript of Pretrial

Petitioner makes much of statistics showing the number of acres of domestic marijuana destroyed annually by state and federal authorities, pointing out that if harvested the destroyed acreage could in each year have accounted for all marijuana estimated to have been consumed in the United States,[82] and that no one knows how many acres escape destruction. However, several factors weaken this argument from domestic growth. First, the number of acres annually destroyed declined by a factor of three between 1959 and 1967,[83] while during the same period the consumption of marijuana, as measured by federal seizures, rose twenty-fold.[84] Assuming constant diligence on the part of those charged with destruction, this would indicate that in 1967 a much smaller share of the market was domestically supplied than in 1959. Second, while the total number of acres annually destroyed has indeed been large enough to furnish all domestically consumed marijuana,[85] the state-by-state breakdowns which are available for the years 1964–1967 reveal that in each of those years more

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Hearing, *United States* v. *Adams*, 293 F. Supp. 776 (1968), at 67, 76 (testimony of Dr. Richard Schultes, Director of Harvard Botanic Museum). See also J. Rosevear, Pot: A Handbook of Marijuana 35, 119–120 (1967).

[82] In 1967, 1,466 acres were destroyed. See United States Government, Report on the Working of the International Treaties on Narcotic Drugs 30 (1967). Accepting the Bureau of Narcotics' lowest estimate of yield per acre, see Brief for the United States 38, n. 42, this acreage would have supplied over 1,200,000 pounds of marijuana. This is enough for about 18,000,000,000 marijuana cigarettes. See *infra*, at 43 and n. 109.

[83] Compare Bureau of Narcotics, Report on the Traffic in Opium and Other Dangerous Drugs 12 (1959), with United States Government, Report on the Working of the International Treaties on Narcotic Drugs 9 (1967). The decline was steady.

[84] Compare Bureau of Narcotics, Report on the Traffic in Opium and Other Dangerous Drugs 43 (1959), with *id.*, at 43 (1967).

[85] See n. 82, *supra*.

than 95% of the destroyed acreage was in two midwestern states, Illinois and Minnesota.[86] The large, recurrent marijuana acreages discovered in those States can plausibly be ascribed to the "volunteer growth from old plantings in the Middle West" about which Commissioner Anslinger testified,[87] while illicit cultivators of marijuana would be likely to choose States with sparser populations and more favorable climates.[88] Third and last, reports of the Bureau of Narcotics and testimony of its agents indicate that in its far-reaching investigations the Bureau has never encountered a system for distributing sizeable quantities of domestically grown marijuana.[89] In contrast, the Bureau has found evidence of many large-scale distribution systems with sources in Mexico.[90]

E.

The Government urges that once it is concluded that most domestically consumed marijuana comes from

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[86] See Bureau of Narcotics, Report on the Traffic in Opium and Other Dangerous Drugs 17 (1965); United States Government, Report on the Working of the International Treaties on Narcotic Drugs 10 (1966); *id.*, at 9 (1967).

[87] See *supra*, at 31.

[88] Most authorities believe that more potent marijuana can be grown in a hot, dry climate. See *infra*, at 41 and n. 102.

[89] See Bureau of Narcotics, Reports on the Traffic in Opium and Other Dangerous Drugs 1956–1967; 2 Transcript of Pretrial Hearing, *United States* v. *Adams*, 293 F. Supp. 776 (1968), at 37–45; United States Government, Report on the Working of the International Treaties on Narcotic Drugs 17 (1966); *id.*, at 24–25 (1967). But cf. Senate Hearings 3488–3490.

[90] See, *e. g.*, Bureau of Narcotics, Report on the Traffic in Opium and other Dangerous Drugs (1965), at 23 (seizure of about 1,800 pounds of Mexican marijuana), 23–24 (seizure of about one ton of Mexican marijuana), 24 (seizure of about 3½ tons of Mexican marijuana); *id.* (1966), at 17 (seizure of about 600 pounds of Mexican marijuana). By contrast, the largest reported seizure of marijuana definitely grown in the United States involved only about eight pounds. See *id.*, at 7 (1967). But see also Senate Hearings 3488–3490.

abroad—a conclusion which we think is warranted by the data just examined—we must uphold the "knowledge" part of the presumption in light of this Court's decision in *Yee Hem* v. *United States*, 268 U. S. 178 (1925). In that case, the Court sustained a presumption which was virtually identical to the one at issue here except that the forbidden substance was smoking opium rather than marijuana. With respect to the inference of knowledge from possession which was authorized by that presumption, the Court said:

> "Legitimate possession [of opium], unless for medical use, is so highly improbable that to say to any person who obtains the outlawed commodity, 'since you are bound to know that it cannot be brought into this country at all, except under regulation for medical use, you must at your peril ascertain and be prepared to show the facts and circumstances which rebut, or tend to rebut, the natural inference of unlawful importation, or your knowledge of it,' is not such an unreasonable requirement as to cause it to fall outside the constitutional power of Congress." 268 U. S., at 184.

The Government contends that *Yee Hem* requires us to read the § 176a presumption as intended to put every marijuana smoker on notice that he must be prepared to show that any marijuana in his possession was not illegally imported, and that since the possessor is the person most likely to know the marijuana's origin it is not unfair to require him to adduce evidence on that point. However, we consider that this approach, which closely resembles the test of comparative convenience in the production of evidence,[91] was implicitly abandoned in *Tot* v. *United States*. As was noted previously, the *Tot*

[91] See *supra*, at 25–26 and n. 56.

Court confronted a presumption which allowed a jury to infer from possession of a firearm that it was received in interstate commerce. Despite evidence that most States prohibited unregistered and unrecorded acquisition of firearms, the Court did not read the statute as notifying possessors that they must be prepared to show that they received their weapons in intrastate transactions, as *Yee Hem* would seem to dictate. Instead, while recognizing that "the defendants . . . know better than anyone else whether they acquired the firearms in commerce," 319 U. S., at 469, the Court held that because of the danger of overreaching it was incumbent upon the prosecution to demonstrate that the inference was permissible before the burden of coming forward could be placed upon the defendant. This was a matter which the *Yee Hem* Court either thought it unnecessary to consider or assumed when it described the inference as "natural." [92]

F.

We therefore must consider in detail whether the available evidence supports the conclusion that the "knowledge" part of the § 176a presumption is constitutional under the standard established in *Tot* and adhered to in *Gainey* and *Romano*—that is, whether it can be said with substantial assurance that one in possession of marijuana is more likely than not to know that his marijuana was illegally imported.

[92] In refusing to follow this aspect of the reasoning in *Yee Hem*, we intimate no opinion whatever about the continued validity of the presumption relating to "hard" narcotics, which was sustained in *Yee Hem* and is now found in 21 U. S. C. § 174. As will appear, our holding that the § 176a "knowledge" presumption is unconstitutional rests entirely upon a detailed inquiry into the available facts about the state of mind of marijuana users. The facts regarding "hard" narcotics may well be significantly different.

Even if we assume that the previously assembled data are sufficient to justify the inference of illegal importation, see *supra*, at 36, it by no means follows that a majority of marijuana possessors "know" [93] that their marijuana was illegally imported. Any such proposition would depend upon an intermediate premise: that most marijuana possessors are aware of the level of importation and have deduced that their own marijuana was grown abroad. This intermediate step might be thought justified by common sense if it were proved that little or no marijuana is grown in this country. Short of such a showing, not here present, we do not believe that the inference of knowledge can be sustained solely because of the assumed validity of the "importation" presumption.

Once it is established that a significant percentage of domestically consumed marijuana may not have been imported at all, then it can no longer be postulated, without proof, that possessors will be even roughly aware of the proportion actually imported. We conclude that in order to sustain the inference of knowledge we must find on the basis of the available materials that a majority of marijuana possessors either are cognizant of the apparently high rate of importation or otherwise have become aware that *their* marijuana was grown abroad.

We can imagine five ways in which a possessor might acquire such knowledge: (1) he might be aware of the

[93] Nothing in the legislative history of § 176a is of aid in determining the intended scope of the word "knowing," as it is used in that section. In making that determination, we have employed as a general guide the definition of "knowledge" which appears in the Proposed Official Draft of the Model Penal Code, at 27 (1962). The Code provides:

"When knowledge of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist."

proportion of domestically consumed marijuana which is smuggled from abroad and deduce that his was illegally imported (2) he might have smuggled the marijuana himself; (3) he might have learned by indirect means that the marijuana consumed in his locality or furnished by his supplier was smuggled from abroad; (4) he might have specified foreign marijuana when making his "buy," or might have been told the source of the marijuana by his supplier; (5) he might be able to tell the source from the appearance, packaging, or taste of the marijuana itself.

We treat these five possibilities *seriatim*, in light of the available materials, beginning in each instance with the legislative record. We note at the outset that although we have been able to discover a good deal of relevant secondary evidence, we have found none of the best kind possible—testimony of marijuana users about their own beliefs as to origin, or studies based upon interviews in which users were asked about this matter. The committee hearings which preceded passage of § 176a included testimony by many marijuana smokers, but none was ever asked whether he knew the origin of the marijuana he smoked. It should also be kept in mind that the great preponderance of marijuana smokers are "occasional" rather than "regular" users of the drug,[94] and that "occasional" smokers appear to be arrested disproportionately often, due to their inexpertness in taking precautions.[95] "Occasional" users are likely to be less informed and less particular about the drug they

[94] See J. Rosevear, Pot: A Handbook of Marijuana 124–125 (1967). It has been estimated that there are 500,000 to 1,000,000 "regular" marijuana smokers in the United States and 3,000,000 to 5,000,000 "occasional" users. See J. Simmons (ed.), Marijuana: Myths and Realities 232 (1967).

[95] See *id.*, at 236; J. Rosevear, *supra*, at 121–125.

smoke;[96] hence, it is less probable that they will have learned its source in any of the above ways.

The first possibility is that a possessor may have known the proportion of imported to domestic marijuana and have deduced that his own marijuana was grown abroad. The legislative record is of no assistance in evaluating this possibility. Such indirect evidence as we have found points to the conclusion that while most marijuana users probably know that some marijuana comes from Mexico, it is also likely that the great majority either have no knowledge about the proportion which is imported or believe that the proportion is considerably lower than may actually be the case.[97]

The second possibility is that a possessor may know the origin of his marijuana because he smuggled it into the United States himself. The legislative record is unhelpful in estimating the proportion of possessors who fall into this class. Other sources indicate that there are a considerable number of smokers who "smuggle their own," but that the great majority of possessors have obtained their marijuana from suppliers in this country.[98]

The legislative record is also uninformative about the possibility that a possessor may have learned the source of his marijuana by indirect means. Other sources reveal that imported marijuana usually passes through a number of hands before reaching the consumer, and

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[96] See *ibid.*

[97] See *United States* v. *Adams*, 293 F. Supp. 776, 780–781, 784–785 (1968).

[98] See Becker, Marijuana: A Sociological Overview 47–50, in D. Solomon (ed.), The Marijuana Papers (1966); Mandel, Myths and Realities of Marijuana Pushing 58–110, in J. Simmons (ed.), Marijuana: Myths and Realities (1967); J. Rosevear, Pot: A Handbook of Marijuana 27–37, 117–131 (1967); J. Simmons (ed.), *supra*, at 231–234. It should be remembered that there are estimated to be at least 3,500,000 "regular" or "occasional" marijuana smokers in the United States. See n. 94, *supra*.

that the distribution system is kept secret.[99] It would appear that relatively few consumers know the origin of their marijuana by indirect means.

The fourth possibility is that the possessor may have specified foreign marijuana when making his purchase or may have been told by his supplier that the marijuana was grown abroad. The legislative record is somewhat more helpful with respect to this possibility, for it does contain statements to the effect that Mexican marijuana is more potent than domestic and is consequently preferred by smokers.[100] However, the legislative record also contains testimony by a customs agent that Texas marijuana is as "good" as that from Mexico.[101] Most authorities state that Mexican marijuana generally does have greater intoxicating power than domestic marijuana, due to the higher temperatures and lower humidity usually encountered in Mexico.[102] There are some indications that smokers are likely to prefer Mexican marijuana,[103] but there is nothing to show that purchasers commonly specify Mexican marijuana when making a "buy." It appears that suppliers of marijuana occasion-

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[99] See authorities cited in n. 98, *supra*.

[100] See *supra*, at 31 (testimony of Commissioner Anslinger); House Hearings 1071–1072, Senate Hearings 4354–4355 (statements of District Supervisor Aman).

[101] See Senate Hearings 3488–3489. See also House Hearings 288.

[102] See authorities collected in A. Hodapp, Marijuana: A Review of the Literature for the Analytic Chemist 13 (1959); Bouquet, Cannabis: Parts I–II, 2 Bull. on Narcotics, No. 4, at 14, 21–22 (1950); Ciba Foundation Study Group No. 21, Hashish: Its Chemistry and Pharmacology 33 (1965); J. Simmons (ed.), Marijuana: Myths and Realities 230 (1967).

[103] See authorities cited in n. 100 *supra*; J. Rosevear, Pot: A Handbook of Marijuana 32–33, 68 (1967); Boughey, Pot Scenes East and West 33–34, in J. Simmons (ed.), Marijuana: Myths and Realities (1967; Mayor's Committee on Marijuana, The Marijuana Problem in the City of New York 9 (1944); J. Simmons (ed.), *supra*, at 233.

ally volunteer the place of origin,[104] but we have found no hint that this is usually done, and there are indications that if the information is not volunteered the buyer may be reluctant to ask, for fear of being thought an informer.[105] We simply are unable to estimate with any accuracy, on the basis of these data, what proportion of marijuana possessors have learned the origin of their marijuana in this way. It is certainly not a majority; but whether it is a small minority or a large one we are unable to tell.

The fifth possibility is that a smoker may be able to tell the source of his marijuana from its appearance, packaging, or taste. As for appearance, it seems that there is only one species of marijuana, and that even experts are unable to tell by eye where a particular sample was grown.[106] The Court of Appeals for the Ninth Circuit did find in *Caudillo* v. *United States*, 253 F. 2d 513 (1958), on the basis of trial testimony, that "unmanicured" or "rough" marijuana—that is, marijuana containing some seeds and stems, as well as leaves—was much more likely to come from Mexico than from California; this was because the presence of seeds implied that the plant had been allowed to mature and evidence showed that California growers almost always harvested the plant before that stage. However, we have found nothing to indicate that this distinction holds good in other areas of the country, or that marijuana possessors are likely to realize its significance.

With respect to packaging, there is evidence that Mexican marijuana is commonly compressed into dis-

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[104] See J. Rosevear, Pot: A Handbook of Marijuana 32–33 (1967).

[105] See *id.*, at 33.

[106] See 1 Transcript of Pretrial Hearing, *United States* v. *Adams*, 293 F. Supp. 776 (1968), at 16–18, 54 (testimony of Dr. Richard Schultes, Director of Harvard Botanic Museum).

tinctive "bricks" and then wrapped in characteristically Mexican paper.[107] Yet even if it is assumed that most Mexican marijuana bears such distinguishing marks when first brought into this country, there is no indication that they normally are still present when it reaches the consumer. The packaging method just mentioned apparently is intended to facilitate transportation of relatively large quantities of marijuana. A "brick" appears usually to contain about one kilogram of marijuana,[108] and relatively few consumer sales will involve such a large amount, since a kilogram of marijuana will furnish some 3,300 marijuana cigarettes.[109] Smokers appear usually to purchase marijuana by the "bag"—about one-fifth ounce; by the "can"—about one ounce; or by the pound.[110] Hence, after importation "[t]he wholesalers will repackage the marijuana into smaller packages, . . . and they will do it in various ways." [111] We infer that only a small percentage of smokers are likely to learn of the drug's origin from its packaging.

With respect to taste, the Senate hearing record contains the statement of a federal customs agent that "A

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[107] See 2 *id.*, at 19–33 (testimony of Narcotics Agent William Durkin). See also Bureau of Narcotics, Report on the Traffic in Opium and Other Dangerous Drugs 17 (1966). But cf. Senate Hearings 3488–3489.

[108] See J. Simmons (ed.), Marijuana: Myths and Realities 237 (1967); J. Rosevear, Pot: A Handbook of Marijuana 159 (1967); Bureau of Narcotics, Report on the Traffic in Opium and Other Dangerous Drugs 17 (1966). See also Senate Hearings 3489.

[109] See J. Rosevear, *supra*, at 29; Mandel, Myths and Realities of Marijuana Pushing 78, in J. Simmons (ed.), *supra*; Senate Hearings 3489.

[110] See J. Rosevear, *supra*, at 28. See also Mandel, *supra*, at 78.

[111] 2 Transcript of Pretrial Hearing, *United States* v. *Adams*, 293 F. Supp. 776 (1968), at 26 (testimony of Narcotics Agent William Durkin).

good marijuana smoker can probably tell good marijuana from bad." [112] As has been seen, there is a preponderance of opinion to the effect that Mexican marijuana is more potent than domestic.[113] One authority states that purchasers of marijuana commonly sample the product before making a "buy." [114] However, the agent quoted above also asserted that some "good" marijuana was grown in Texas. And the account of the sampling custom further states that tasting is merely a ritual since "[u]sually the intoxication will not differ much from one cigarette to another . . . ." [115] Once again, we simply are unable to estimate what proportion of marijuana possessors are capable of "placing" the marijuana in their possession by its taste, much less what proportion actually have done so by the time they are arrested.

G.

We conclude that the "knowledge" aspect of the § 176a presumption cannot be upheld without making serious incisions into the teachings of *Tot*, *Gainey*, and *Romano*. In the context of this part of the statute, those teachings require that it be determined with substantial assurance that at least a majority of marijuana possessors have learned of the foreign origin of their marijuana through one or more of the ways discussed above.

We find it impossible to make such a determination. As we have seen, the materials at our disposal leave us at large to estimate even roughly the proportion of marijuana possessors who have learned in one way or another the origin of their marijuana. It must also be recognized that a not inconsiderable proportion of domesti-

[112] Senate Hearings 3489 (prior testimony of Customs Agent Lawrence Fleishman).

[113] See *supra*, at — and n. 102.

[114] See J. Rosevear, Pot: A Handbook of Marijuana 31–33 (1967).

[115] *Id.*, at 32.

cally consumed marijuana appears to have been grown in this country, and that its possessors must be taken to have "known," if anything, that their marijuana was *not* illegally imported. In short, it would be no more than speculation were we to say that even as much as a majority of possessors "knew" the source of their marijuana.[116]

Nor are these deficiencies in the foundation for the "knowledge" presumption overcome by paying, as we do, the utmost deference to the congressional determination that this presumption was warranted. For Congress, no less than we, is subject to constitutional requirements, and in this instance the legislative record falls even shorter of furnishing an adequate foundation for the "knowledge" presumption than do the more extensive materials we have examined.

We thus cannot escape the duty of setting aside petitioner's conviction under Count 2 of this indictment.

For the reasons stated in Part I of this opinion, we reverse outright the judgment of conviction on Count 3 of the indictment. For the reasons stated in Part II,

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[116] A careful examination of the lower-court decisions regarding the presumption's constitutionality does not suggest the contrary. All courts of appeals which have ruled on the question have sustained the presumption. See *Caudillo* v. *United States*, 253 F. 2d 513 (C. A. 9th Cir. 1958); *Costello* v. *United States*, 324 F. 2d 260, 263–264 (C. A. 9th Cir. 1963); *United States* v. *Soto*, 256 F. 2d 729, 735 (C. A. 7th Cir. 1958); *Borne* v. *United States*, 332 F. 2d 565, 567 (C. A. 5th Cir. 1964); *United States* v. *Gibson*, 310 F. 2d 79, 82 (C. A. 2d Cir. 1962). However, there is no indication that in any of these cases the court had before it or took into account even a fraction of the evidence which we have considered; in one instance, the lack of evidence was expressly stated to be the ground of decision. See *United States* v. *Gibson*, *supra*. See also *Costello* v. *United States*, *supra*. The only lower court which conducted a factual inquiry in any way comparable to our own also held the presumption unconstitutional. See *United States* v. *Adams*, 293 F. Supp. 776 (D. C. S. D. N. Y. 1968).

we reverse the judgment of conviction on Count 2 and remand the case to the Court of Appeals for further proceedings consistent with this opinion. We are constrained to add that nothing in what we hold today implies any constitutional disability in Congress to deal with the marijuana traffic by other means.

Reversed and remanded.

MR. CHIEF JUSTICE WARREN joins Part II of the opinion of the Court and, considering himself bound by the decisions in *Marchetti* v. *United States*, 390 U. S. 39 (1968), *Grosso* v. *United States*, 390 U. S. 62 (1968), and *Haynes* v. *United States*, 390 U. S. 85 (1968), concurs in the result as to Part I.

SUPREME COURT OF THE UNITED STATES

No. 65.—October Term, 1968.

Timonthy F. Leary, Petitioner, v. United States. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May 19, 1969.]

Mr. Justice Stewart, concurring.

I join Part II of the Court's opinion. As to Part I, I have before now expressed my conviction that the Fifth Amendment guaranty against compulsory self-incrimination was originally intended to do no more than confer a testimonial privilege in a judicial proceeding.[1] But the Court through the years has drifted far from that mooring; the *Marchetti* and *Grosso* cases[2] are simply the most recent in a long line of decisions marking the extent of the drift. Perhaps some day the Court will consider a fundamental re-examination of its decisions in this area, in the light of the original constitutional meaning. Until that day comes, it seems to me that the authoritative weight of precedent permits no escape from the conclusion reached by the Court in this case. I therefore join its opinion and judgment.

[1] See *Grosso* v. *United States*, 390 U. S. 62, at 76 (concurring opinion); *In re Gault*, 387 U. S. 1, at 80, n. 3 (dissenting opinion).

[2] *Marchetti* v. *United States*, 390 U. S. 39; *Grosso* v. *United States*, 390 U. S. 62.

SUPREME COURT OF THE UNITED STATES

No. 65.—October Term, 1968.

Timothy F. Leary, Petitioner, v. United States. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[May 19, 1969.]

Mr. Justice Black, concurring in the result.

I concur in the Court's outright reversal of the petitioner's conviction on Count 3 of the indictment for the reasons set out in Part I of the Court's opinion.

I also concur in reversal of the petitioner's conviction under Count 2 of the indictment, based on 28 U. S. C. § 176a. That section makes it a crime to import marijuana into the United States or to receive, conceal, or transport it, knowing it to have been imported contrary to law, and then goes on to provide that the mere possession of marijuana shall be "deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury." The trial court in this case charged the jury that proof that petitioner merely had possession of marijuana was sufficient to authorize a finding that he knew it had been imported or brought into the United States contrary to law. It is clear beyond doubt that the fact of possession alone is not enough to support an inference that the possessor knew it had been imported. Congress has no more constitutional power to tell a jury it can convict upon any such forced and baseless inference than it has power to tell juries they can convict a defendant of a crime without any evidence at all from which an inference of guilt could be drawn. See *Thompson* v. *Louisville*, 362 U. S. 199

(1960). Under our system of separation of powers, Congress is just as incompetent to instruct the judge and jury in an American court what evidence is enough for conviction as the courts are to tell the Congress what policies they must adopt in writing criminal laws. The congressional presumption, therefore, violates the constitutional right of a defendant to be tried by jury in a court set up in accordance with the commands of the Constitution. It clearly deprives a defendant of his right not to be convicted and punished for a crime without due process of law, that is a trial in federal cases before an independent judge, after an indictment by grand jury, with representation by counsel, an opportunity to summon witnesses in his behalf, and an opportunity to confront the witnesses against him. This right to a full-fledged trial in a court of law is guaranteed to every defendant in Article III of the Constitution, in the Sixth Amendment, and in the Fifth and Fourteenth Amendments' promises that no person shall be deprived of his life, liberty, or property without due process of law—that is, a trial according to the law of the land, both constitutional and statutory.

It is for these reasons, and not because I think the law is "'irrational' or 'arbitrary,' and hence unconstitutional," *ante*, p. 28, that I would invalidate this presumption. I am firmly and profoundly opposed to construing "due process" as authorizing this Court to invalidate statutes on any such nebulous grounds. My quite different reasons for holding that the presumption does deny due process of law, that is the benefit of the "law of the land," have been fully set out in many opinions, including, for illustration, my concurring opinion in *Tot* v. *United States*, 319 U. S. 463, 473 (1943), and my dissenting opinion in *United States* v. *Gainey*, 380 U. S. 63, 74 (1965).